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NO. 22,145

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JAMES HARAMIS and ANDREAS TRIPLIS,
Petitioners,

v.

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

RESPONDENT'S BRIEF

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INDEX

AUTHORITIES CITED

CASES

NO. 22,145

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JAMES HARAMIS and ANDREAS TRIPLIS, Petitioners,	]
v.	]
IMMIGRATION AND NATURALIZATION SERVICE, Respondents.	]

RESPONDENT'S BRIEF

JURISDICTION

The petition for review filed herein seeks review of a final order of deportation, and specifically the denial of petitioners' applications for status as permanent residents, pursuant to §245 of the Immigration and Nationality Act (8 USC 1255). Said applications were made during the hearing before the Special Inquiry Officer conducted pursuant to §242(b) of the Act (8 USC 1252(b)). This Court has jurisdiction under §106 of the Act (8 USC 1105a).

STATEMENT OF THE CASE

Petitioners entered the United States for the first time at Honolulu, Hawaii, on January 2, 1967, as nonimmigrants, for the purpose of performing as entertainers, pursuant to §101(a)(15)(H)(iii), (8 USC 1101(a)(5)(iii)). On or about January 27, 1967 petitioners' nonimmigrant status was changed to that of temporary workers, of distinguished merit and ability, pursuant to §101(a)(15)(H)(i) (8 USC (a)(15)(H)(i)). Their status in this classification was twice extended. On May 17, 1967 respondent denied further extension and advised petitioners to leave the United States no later than June 17, 1967.

On or about June 15, 1967 petitioners filed petitions with respondent for classification in third preference status, as immigrants of "exceptional ability" in the arts, pursuant to §203 (a)(3) of the Act (8 USC 1153(a)(3)).

Petitioners did not depart from the United States on June 17, 1967, and on June 19, 1967 orders to show cause issued, charging deportability pursuant to §241(a)(2) of the Act (8 USC 1251(a)(2)), in that they remained in the United States for a longer time than permitted.

At the hearing on June 26, 1967 petitioners filed applications for status as permanent residents pursuant to §245 of the Act (8 USC 1255). A request for continuance of the hearing until respondent should act on the §203(a)(3) applications was denied. The §245 applications were denied, and they were accorded voluntary departure.

Appeal to the Board of Immigration Appeals was dismissed August 15, 1967.

On October 23, 1967 respondent approved the §203(a)(3) applications.

SPECIFICATION OF ERROR

The error specified is in refusing to continue the hearing pending completion of processing of petitioners' §245 applications.

STATUTES

> "SEC. 245. (a) The status of an alien, other than an alien crewman, who was inspected and admitted or paroled into the United States may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is approved.
> * * * * * * * * * "

"SEC. 203. (a)
(3) Visas shall next be made available, in a number not to exceed 10 per centum of the number specified in section 201(a)(ii), to qualified immigrants who are members of the professions, or who because of their exceptional ability in the sciences or the arts will substantially benefit prospectively the national economy, cultural interests, or welfare of the United States."

ARGUMENT

Petitioners, by their Counsel, have stipulated to being deportable as charged in the order to show cause (R., p. 19). There is no question as to the sufficiency of the record on the Woodby standard (Woodby v. INS, 385 US 276).

The issue of these cases, if any, concerns the applications for permanent resident status under §245, which are addressed to the discretion of the Attorney General. The disposition of the applications is subject to review on the petitions herein, as the administrative decision was made by the Special Inquiry Officer, and was an integral part of the deportation proceedings.

Foti v. INS
375 US 217, 230

Petitioners concede that to establish eligibility for permanent residence the applicant must show that an immigrant visa is immediately available to him at the time his application is approved. §245(a)(3).

Their argument is directed to the applications made for third preference status under §203(a)(3). They assert (Brief, p. 5) that when they appeared at the hearing, they were without approved preference status and that necessarily the Special Inquiry Officer concluded that an immigrant visa was not available and so denied their §245 applications. They contend that the hearing should have been adjourned pending processing of the §203(a)(3) applications, "and that when such petitions were approved, that immigrant visas would be available to them."

In their final paragraph (Brief, p. 5), they state it is their position that the proceedings be remanded for further administrative processing "to determine whether immigrant visas will be immediately available to them at the time their applications are approved, and, therefore, whether

"they are eligible for status as permanent residents of the United States."

This paragraph opens with the statement, "On October 23, 1967, however, petitioners' request for classification for 'third preference' status was approved, thus giving them a priority position under the Greek quota." This statement is misleading. No contention is made that, as required by §245(a)(3), an immigrant visa is immediately available. Petitioners know that United States Department of State Visa Office Bulletin No. 174 dated July 14, 1967, notes that visas under the third preference portion of the quota for Greece are available only to applicants with petitions filed prior to November 1, 1966 (Tr., p. 3).

The requests for adjournment were also addressed to the discretion of respondent. They were denied because even though the third preference visas had been approved, no immigrant visas would have been "immediately available", as disclosed by the State Department Visa Office Bulletin 179, dated November 15, 1967; third preference under the Greek quota is not

current, and numbers are available for applicants with petitions filed prior to December 16, 1966.

Petitioners filed their petitions for "third preference" status on June 16, 1967. Respondents respectfully submit that there is no showing of abuse of discretion. If there is any basis for relief by way of remand, petitioners should move the Board of Immigration Appeals to reopen.

CECIL F. POOLE
United States Attorney

By: ______________________________
CHARLES ELMER COLLETT
Chief Assistant United States Attorney

DATED: January 11, 1967.

STATE OF CALIFORNIA]
                                    ] ss.
CITY AND COUNTY OF SAN FRANCISCO]

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

CHARLES ELMER COLLETT
Chief Assistant United States Attorney

= =

Being first duly sworn, I hereby certify that a copy of the foregoing Respondent's Brief was served upon the petitioners by depositing the same in the United States mail on this date at 450 Golden Gate Avenue, San Francisco, California, addressed to the Attorneys for the Petitioners,

DONALD L. UNGAR, Esq.
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517 Washington Street
San Francisco, California 94111

CHARLES ELMER COLLETT
Chief Assistant United States Attorney

Subscribed and sworn to before me
this 11th day of January, 1968:

____

22,147

No. ~~21,068~~

United States Court of Appeals

For the Ninth Circuit

ILLINOIS TOOL WORKS, INC., *Appellant*,	
vs.	
REX L. BRUNSING, et al., *Appellees*.	

APPELLANT'S PETITION FOR REHEARING

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22,147
No. ~~21,068~~

United States Court of Appeals
For the Ninth Circuit

ILLINOIS TOOL WORKS, INC., *Appellant*, vs. REX L. BRUNSING, et al., *Appellees*.	

APPELLANT'S PETITION FOR REHEARING

To the Honorable Frederick G. Hamley, Oliver D. Hamlin and Ben C. Duniway, Circuit Judges:

Most respectfully, we petition this Court to grant a rehearing of its decision filed on January 5, 1968. In finding non-infringement by limiting patent claims to specific structure "in the light of the specifications and drawings," (Slip Opinion, p. 2), the opinion creates such confusion and conflict in the law governing the interpretation of patent claims vis-a-vis the definition of infringement that rehearing and reargument are necessary—if uniformity of the law is to prevail in this circuit. In this petition, we make three points.

First. The Court will recall that, at the oral argument of this case held on April 14, 1967, we demonstrated word for word, and element for element, correspondence be-

tween the accused carrier and at least one of the claims of the Holmberg patent and argued, as noted by the Court, "that the accused structure either reads on the patent claims or is substantially equivalent thereto." (Slip Opinion, p. 2). The opinion does not find non-infringement because Brunsing omitted or avoided anything which is defined in any of the claims of the two patents. Instead, the opinion finds non-infringement solely on the basis of features of the accused device which were added to the basic structures recited in the specific words of the patent claims. By these added features, the accused carrier, in the words of the opinion, "not only obtains improved results, but it obtains those results in a substantially different manner without using the teaching of Holmberg or Poupitch." (Slip Opinion, p. 3).

This then means that the present opinion authorizes trespass upon claimed subject matter provided the putative infringer adds something which obtains an improved result not taught by the specification or drawings of the patent in suit. In announcing and applying such a principle the present opinion, we submit most respectfully, is in direct and irreconcilable conflict with

Neff Instrument Corporation v. Cohu Electronics, Inc., 298 F.2d 82, particularly pages 88-89 (decided by Judges Barnes, Hamley and Duniway on December 11, 1961, in an opinion written by Judge Barnes);

Locklin v. Switzer Brothers, Inc., 299 F.2d 160, particularly page 168 (decided by Judges Barnes, Jertberg and Merrill on November 16, 1961, in an opinion written by Judge Merrill); and

Hansen v. Colliver, 282 F.2d 66, particularly page 69 (decided by Judges Chambers, Jertberg and Koelsch on August 23, 1960, in an opinion written by Judge Jertberg).

It is also, we submit, in conflict with *Temco Co. v. Apco Co.* (1928), 275 U.S. 319, 328, where the improvement was of sufficient consequence to be patentable over the patent in suit.

Second. In deciding the legal principles governing the present claim interpretation on the basis of *Del Francia v. Stanthony Corporation,* 278 F.2d 745, (decided by Judges Barnes, Hamley and Jertberg on May 2, 1960, in an opinion written by Judge Jertberg), this Court did not have the benefit of argument on the original hearing. None of the parties cited *Del Francia* on the decided proposition. We cited *Del Francia* only for the proposition that the question of infringement resolves itself into one of law (page 35 of our opening brief). Appellees' brief and our reply brief do not even mention *Del Francia.*

Reargument should therefore be granted to permit us to point out that *Del Francia* involved the special situation of the construction of a functional or means clause under U. S. Code, Title 35, Section 112; that in *Del Francia,* "the accused device does not read word for word on the claim in the patent." (278 F.2d at p. 749); and that *Del Francia* was not intended to announce a rule of general application, as is evidenced by the later decided cases cited under point *First* of this petition for rehearing. *Neff, Locklin* and *Hansen* of necessity either require

a limited application of *Del Francia* to the facts of that case or by implication overrule the authority of *Del Francia.*

Third. The present opinion seems to overrule *sub silentio* at least three opinions written by different panels of this same Court. *Neff, Locklin* and *Hansen* were all before this Court on our opening brief. *Neff* and *Hansen* were specifically cited to the proposition which all three cases support. By implication, the present opinion might be thought to overrule the cited proposition under the authority of *Bingham v. United States* (1935), 296 U.S. 211, official headnote 4, discussed at pages 218-219.

For uniformity of decision in this circuit on this important rule of law governing the construction of patent claims, and to resolve the question of whether *Neff, Locklin* and *Hansen* still state the law of this circuit on the question of infringement, we suggest rehearing *en banc.* Judges Chambers, Barnes, Merrill and Koelsch, who participated in *Neff, Locklin* and *Hansen,* should have the opportunity to participate in any decision which undermines, or seems to undermine, the rules which those three cases establish and apply. Judges Browning, Ely and Carter, who participated in none of the cases, should have the opportunity to express their views on the conflict of opinion. If this is not done, then patentees and putative infringers alike cannot possibly know whether infringement is to be determined in this circuit by a broad and general application of *Del Francia,* as was done in the present case, or by the application of those literal interpretation principles which support the contrary decisions in *Neff, Locklin* and *Hansen.*

Precedent for resolving *en banc* the standards to be applied in deciding patent issues (there validity) is found in *Armour & Co. v. Wilson & Co.* (7 Cir. 1960), 274 F.2d 143, 151.

For the reasons stated, we submit most respectfully that this petition for rehearing should be granted and suggest that reargument should be heard *en banc.*

Respectfully submitted,

CARL HOPPE,
RICHARD R. TREXLER,
ERNEST M. ANDERSON,
Attorneys for Appellant.

CERTIFICATION

I certify that the foregoing petition, in my judgment, is well founded, and that the same is not interposed for delay.

CARL HOPPE,
Attorney for Appellant.

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

0 0 0

RICHARD S. SIMPSON, Appellant,	]	
vs.	]	No. 22148
UNION OIL COMPANY OF CALIFORNIA, Appellee,	]	

APPELLANT'S OPENING BRIEF

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Statutes Cited:

Federal Rules Cited:

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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

0 0 0

RICHARD S. SIMPSON, Appellant, vs. UNION OIL COMPANY OF CALIFORNIA, Appellee.	No. 22148 APPELLANT'S OPENING BRIEF

STATEMENT OF JURISDICTION

Appellant, Richard S. Simpson, filed a complaint against the Union Oil Company of California under the federal antitrust laws, specifically Title 15, U.S.C.A., Sections 15 and 26, being part of an act of the federal Congress, commonly known as the Sherman and Clayton Acts, which vest in the District Court jurisdiction of suits by any person injured in his business or property by reason of anything forbidden in the antitrust laws. The plaintiff-appellant appeals from a judgment for the defendant dismissing plaintiff's complaint with prejudice, notwithstanding a jury verdict that appellant was damaged in the sum of $160,000.00 by appellee. (Cr. 548-550, 297)

[illegible]

The court in the same order denied appellee's motion under F.R.C.P. Rule 50(b) for judgment notwithstanding verdict, but granted the appellee a new trial. (Cr. 550) Appellant here seeks review of the court's order granting a new trial.

This is the second appeal between the parties. The District Court below gave judgment for defendant on January 6, 1961. (R. 360-361) Appeal was taken and this court affirmed the judgment under Docket Number 17308 on January 2, 1963. Simpson v. Union Oil Company of California, 311 F.2d 764 9th Cir., cert. granted, 373 U.S. 901 (1963), rev'd, 377 U.S. 13 (1964).

Accordingly, this brief will refer to the record in Appeal Number 17308 in the United States Court of Appeals for the Ninth Circuit as "R.", to the clerk's record in the above numbered appeal No. 22148 as "Cr." and to the reporter's transcript of the trial as "Tr."

STATEMENT OF THE CASE

a. Basis of Suit:

Appellee refused to renew appellant's one year lease to a Union Oil service station at 4010 East Ventura Avenue, Fresno, California, pursuant to an unlawful plan to control otherwise independent judgments as to retail prices by the service station dealers. The program of Union Oil Company to so control resale prices was called the Retail Dealer Consignment Agreement Program. Appellee's refusal to allow a renewal of the lease arose out of appellant's refusal to abide by the retail price fixing directions of the

Section 4 of the Clayton Act, October 14, 1914, Chap. 323, Sec. 4, 38 Stat. 781, U.S.C., Sec. 15, states:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in the District Court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount of controversy, and shall recover threefold the damages by him sustained, and the cost of the suit, including a reasonable attorney's fee."

Sections 1 and 2 of the Sherman Act provide in part:

> "Section 1: Every contract, combination in a form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal . . . ." 15 U.S.C. Sec. 1 (1964).

> "Section 2: Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor . . . . " *Id.* Sec. 2

Union Oil Company of California embarked on a

13, 3, 4, 7, 8) At all times herein, Union Oil Company issued only one year leases. Under the Retail Dealer Consignment Agreement Program the dealer was required to sign a consignment agreement allowing control of his gasoline prices as a condition to lease occupancy. (Tr. 391, 393-395) The dealer's prices were policed. (Pl. Ex. No. 15) The dealers had no opportunity to change the agreement, as they could not obtain a lease renewal unless they agreed to remain on consignment. (P. Ex. Nos. 7, 8; Tr. 395) The dealers were threatened by Union Oil Company representatives that they had better raise(or lower) the retail price. (Tr. 605-607) In order to prevent a court test, Mr. Simpson was warned it was foolish of him to try to sue Union Oil Company. (Tr. 622-623)

b. <u>Proceedings below</u>:

The appellant originally filed a compaint for an injunction on May 21, 1958. Plaintiff had originally sought to maintain possession of the service station site as to which he was a lessee under a one year lease commencing May 23, 1956. (R. 89) Plaintiff had signed another lease dated May 23, 1957, and this lease was not renewed as of May 23, 1958. (R. 28-36, 93) The United States District Court below, The Honorable George B. Harris, Judge, denied plaintiff's application for a preliminary injunction and issued a Memorandum Opinion and Order (R. 42-44), stating, in part, as follows:

"If plaintiff has a cause of action for

defendants' alleged breach of a contractual relationship, he is not without remedy, which is adequate to compensate him. (Cappeta vs. Atlantic Refining Co., 74 F.2d 53." (R. 44)

Thereafter, plaintiff filed an amended complaint. (R. 46-59) Defendant then moved for a summary judgment on the amended complaint on July 18, 1958 (R. 59-61), which was denied. (R. 87-88)

Pretail conferences were held on April 30, 1959 (R. 368-392), May 21, 1959 (R. 392-406), February 11, 1960 (. 407.435), and September 16, 1960 (R. 436-452). Pursuant to these pretrial conferences, motions for summary disposition were argued, the defendant moving for a summary judgment and the plaintiff for a partial summary judgment on the issue of violation of the antitrust laws. (R. 298, 337-338) The District Court below entered its Memorandum and Order denying plaintiff's motion for partial summary judgment and granting defendant's motion for summary judgment. (R. 347-360) This order was the subject of appeal number 17308, supra, and of the decision of the Supreme Court in this case, 377 U.S. 13.

In Simpson v. Union Oil Company of California, 377 U.S. 13 (1964), the Supreme Court held that Union Oil Company's Retail Dealer Consignment Agreement program violated the Sherman Act. Its opinion concluded as follows:

"Hence on the issue of resale price maintenance under the Sherman Act there is nothing left to try, for there was an agreement for resale

price maintenance, coercively employed.

"The case must be remanded for a hearing on all the other issues in the case, including those raised under the McGuire Act, 66 Stat. 631, 15 U.S.C. Sec. 45 and the damages, if any suffered. We intimate no views on any other issue; we hold only that resale price maintenance through the present, coercive type of 'consignment' agreement is illegal under the antitrust laws, and that petitioner suffered actionable wrong or damage. We reserve the question whether, when all the facts are known, there may be any equities that would warrant only prospective application in damage suits of the rule governing price fixing by the 'consignment' device which we announced today." 377 U.S. at 24-25.

At trial appellee withdrew the McGuire Act defense upon appellant's rebuttal offer to prove price conversations between Union Oil's manager and those of its competitor Sunland Oil Company pertaining to the area where Mr. Simpson's station was located. The proffered testimony appears in the deposition of Mr. Fred Perry Olson. (Tr.1491-1501; Pl. Ex. No. 89 for Ident., see R. 494-525).

Upon the remand further pretrial conferences were held on August 26, 1965, December 6, 1965, May 17, 1966, and June 20, 1966. (Tr. 2-136) The plaintiff having filed his pretrial statement on August 24, 1965 (Cr. 5), the defendant urged at the first pretrial conference that there should be a

ruling as to whether or not the mandate of the Supreme Court allowed the defendant to show equities allowing only a purely prospective application of the Supreme Court decision, which would prevent the recovery of damages by appellant. By the second conference, Union Oil Company had filed its pretrial papers. (Cr. 26-36)

Argument was held with respect to the scope of the Supreme Court remand and the matter was briefed by the parties. A subsequent pretrial hearing was held on May 17, 1966, at which time the District Court held that the mandate of the Supreme Court allowed defendant Union Oil Company of California to present evidence in support of its theory that the equities would preclude application of the Supreme Court's decision to Simpson himself. (Tr. 98-99)

Thereafter, appellant filed "Plaintiff's Amendment To Its Pretrial Statement Following The Pretrial Conference of May 17, 1966" (Cr. 103-108), and "Plaintiff's Motion For Further Specification of the Pretrial Order and For the Production of Documents." (Cr. 109-112) Plaintiff's motion was heard on June 20, 1966.

At that time the defendant filed opposition papers and a proposed pretrial order. The District Court denied the plaintiff's motions and entered its pretrial order without allowing plaintiff to file his proposed order and with only cursory discussion. (Tr. 128-135) The Pretrial Order stated with respect to the "equity" issue:

> "Included in the issues to be tried is the issue whether the equities warrant only prospective

application of the rule announced by the Supreme Court in this case governing price fixing by the consignment device; specifically, in this case, where the facts occurred before the Supreme Court announced its rule, whether the equities preclude application of that rule. In that connection, upon the trial of the case, defendant shall be afforded an opportunity to present to the Court and to the jury evidence supportive of its claim that the equities do not warrant application in this case of the rule respecting consignment agreements announced by the Supreme Court."

(Cr. 124)

The Court also foreclosed the issues of whether defendant had "attempted to monopolize" the wholesaling and retailing of gasoline in violation of Section 2 of the Sherman Act, and whether the defendant had unlawfully tied the sale of petroleum products to its leases in violation of Section 1 of the Sherman Act or entered into exclusive dealing contracts with its dealers. (Cr. 124-125)

Following the Pretrial Order of June 20, 1966, appellant filed in the United States Supreme Court his "Motion For Leave to File Petition and Petition for Writ of Prohibition of Mandamus or Both In The Alternative" seeking a writ prohibiting enforcement of the pretrial order, a writ compelling respondent Court to preclude defendant from asserting any "equities" which would warrant prospective application of the Simpson decision, 377 U.S. 13, supra, in any other court than

the District Court to allow trial of the aforesaid excluded issues. The writs were denied. Simpson v. United States District Court, 385 U.S. 806 (1966).

On January 23 and 24, 1967, the trial court and counsel held final pretrial conferences. (Tr. 137-206) Jurors were impaneled on January 26, 1967 (Cr. 572-573), and trial commenced January 30, 1967, before the Honorable Albert C. Wollenberg and a jury. Prior to the instructions to the jury, the Court allowed the defendant to present testimony in support of its defense on the "equities" in the presence of the jury, but at the close of the plaintiff's case in rebuttal, the Court withdrew the issue of a defense based on the equities from the jury's consideration and for the first time declared it exclusively for the trial court's determination. (Tr. 1631-1632)

On February 17, 1967, the jury returned a verdit for the appellant in the sum of $160,000.00. (Cr. 297) The court refused to enter a judgment on the jury verdict and scheduled hearings on the issue of prospectivity under the so-called "equity" defense. (Tr. 1670)

More than 10 days after the verdict, defendant on March 10, 1967, filed its "Notice of Motions for Judgment Notwithstanding the Verdict and for a New Trial." (Cr. 301-303, 345, 348) The Motions were supported by affidavits of two jurors and the declaration of juror Elaine Grigon. The declarations were obtained by counsel for the defendant, who had solicited the jurors. (Tr. 1784-1786) Following the filing

for Entry of Judgment, Determination of Reasonable Attorney Fees, Striking the Affidavits and Declaration of Jurors Marjorie Smith, William Price and Elaine Grigon." (Cr. 361-365) The Court on April 28, 1967, denied plaintiff's motion to strike the juror affidavits and declaration, to enter judgment on the verdict, and to enter reasonable attorney fees. (Cr. 575)

The same day the Court announced its decions that it would enter judgment for the defendant based on the equities. (Tr. 1803) The trial court denied defendant's motion for a judgment notwithstanding the verdict but ordered a new trial on the grounds that the verdict was against the weight of the evidence, shocked its conscience, was grossly and monstrously excessive, resulted from either passion or prejudice or from consideration by the jury of factors irrelevant to the litigation, was speculative and conjectural, and constituted a miscarriage of justice. (Cr. 550)

QUESTIONS PRESENTED

1. Did the statement of the Supreme Court, "We reserve the question whether, when all the facts are known, there may be any equities that would warrant only prospective application in damage suits of the rule governing price fixing by the 'consignment' devices which we announce today" authorize the District Court to allow appellee a hearing on the equities in Simpson's action against it?

2. Does the United States Constituion allow a federal district court general power to refuse to enforce a

jury verdict which has found that a party has been damaged under an act of Congress?

3. Are the Sherman Act and the private right of action based on the Sherman Act, 15 U.S.C.A. Sec. 15, subject to nonstatutory defenses in favor of those at whom the Sherman Act was aimed?

4. Even assuming that the Supreme Court's mandate allowed a determination of the equities so that the District Court could review whether or not its decision would be prospective, are there any equities in favor of a party who has pursued price control in the face of investigations of the Department of Justice and Congress and whose General Counsel has admitted that the coercive features of the price control program were left to marketing?

5. Did the Court err in not entering a judgment for the plaintiff on the jury's verdict?

6. May a trial court which has permitted a plaintiff to introduce evidence and make arguments to the jury on damages in a certain range of figures grant a new trial on the ground of excessive or monstrous damages, where the verdict is within that range?

7. Did the trial court err in not striking juror affidavits based on attorney interviews?

8. Did the pretrial order of June 20, 1966, conflict with the mandate of the Supreme Court allowing the plaintiff a trial determination of all remaining issues, by deleting the issue of appellee's violation of Sections 1 and 2 of the Sherman Act by entering into unlawful tie-ins and exclusive

attempting to monopolize the wholesaling and retailing of petroleum products?

SPECIFICATION OF ERRORS

I. The Trial Court erred in refusing to enter judgment on the jury verdict for plaintiff.

II. The Trial Court erred in dismissing defendant's complaint with costs, based on so-called "equities" favorable to Union Oil Company.

III. The Findings of Fact by the Trial Court do not support its judgment.

IV. Findings of Fact Nos. 1 through 15, are erroneous:

A. Findings of Fact Nos. 1, 3, 7, 8, 9, 10, 11, and 13 are erroneous because they are in conflict with the opinion of the Supreme Court in this action.

B. Finding of Fact No. 2 is erroneous in that the record shows that General Counsel of Union Oil Company failed to study the antitrust laws applicable to its retail price control program as carried out.

C. Finding of Fact No. 4 is erroneous because the record affirmatively shows that General Counsel testified that the implementation of the Retail Dealer Consignment Agreement program was left to appellee's marketing personnel.

D. Findings of Fact Nos. 5, 7, 8, 9, and 10 are irrelevant and immaterial by reason of the Supreme Court decision which held that plaintiff's knowledge of or consent to defendant's unlawful price control program was not a defense.

E. Findings of Fact Nos. 11 and 13 cannot be sustained in veiw of the applicable law in existence as of 1954, and of the statement in the Supreme Court opinion that Union Oil was asking for an extension of General Electric.

F. Findings of Fact Nos. 12, 14 and the findings incorporated in No. 15 are erroneous because the record does not support the conclusions set forth therein; the record rather showing that General Counsel left the coercive features of the program to marketing and performed a cursory analysis of the fields of law applicable to the price control pogram.

V. The orders and judgment of the Trial Court conflict with the United States Constitution, Article I, and Amendments V and VII, and with the doctrine of separation of powers.

VI. The Trial Court erred in granting the defendant's motion to set aside the verdict and granting a new trial, in that the verdict was in accordance with the evidence and with argument of counsel permitted by the Court.

VII. The Trial Court erred in not striking the affidavits of jurors Smith and Price and the declaration of juror Grigon.

VIII. The Trial Court erred in not allowing appellant to prove violations of Section 2 of the Sherman Act and of Section 1 of the Sherman Act in that the Retail Dealer Consignment Agreement program involved unlawful tie-ins of the sale of petroleum products to real property interests, constituted exclsuive dealings in gasolines, and was an attempt to monopolize the wholesaling and retailing of petroleum products.

SUMMARY OF ARGUMENT

On April 20, 1964, the Supreme Court of the United States held that appellant Richard S. Simpson had suffered actionable wrong at the hands of appellee Union Oil Company, through the latter's coercive imposition of a retail price maintenance system on its dealers. Simpson v. Union Oil Co., 337 U.S. 13 (1964). The cause was remanded to the District Court for trial on the remaining issues.

The Court split 5-3 on the scope of the remand. The dissenter, Mr. Justice Stewart, relying on the conclusion that Union's marketing contract was in form a bona fide consignment agreement, did not think that a Sherman Act violation could be found on the record in summary judgment, and would therefore have withheld judgment until after a trial on all issues. The opinion of the Court, however, followed its previous decisions in Standard Oil Co. v. United States, 337 U.S. 293 (1949), and in United States v. Masonite Corporation, 316 U.S. 265 (1942), and held that appellee had violated the Sherman Act, and had, in so doing, engaged in conduct which created a cause of action in Simpson under Section 4 of the Clayton Act, regardless of his ability to deal elsewhere.

What provoked the split was that Mr. Justice Douglas' majority opinion consists of two parts: (1) the holding, based on settled principles, that it was unlawful for Simpson's supplier-lessor to lace him into a coercive price fixing scheme, cf. United States v. Parke, Davis & Co., 362 U.S. 29 (1960); Federal Trade Comm'n v. Beech-Nut Packing Co., 257 U.S. 441 (1922) and (2) the announcement that retail price

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control, covering a vast distribution system involving many independent outlets is unlawful regardless of whether the pricing agreements are denominated consignments and regardless of whether coercive devices are employed. Justice Stewart, apparently not in sympathy with the court's finding of coercion upon a record based upon motions for summary judgment in Simpson, supra, would have held that bona fide consignment legitimizes resale price control whether or not the supplier was enforcing resale price restrictions on unpatented articles.

In the last sentence of the opinion, the justices who made up the majority answered Justice Stewart's fears that the Simpson decision would bring before the Court bona fide consignment systems, not coercive, and entered into in reliance on United States v. General Electric Co., 272 U.S. 476 (1926), by reserving the question of retroactivity in cases affected by the broader Simpson rule, but did not retreat from their holding.

On remand, the district court failed to distinguish between the form of Union's consignment agreement and the coercive application of its retail price maintenance policy as found by the Supreme Court. Treating appellee, which had been the subject of the Simpson holding, as it were another litigant altogether, the court below decided that Justice Douglas' reservation of the retroactivity vel non of the rule he announced obiter was really an invitation to the trial cort to refuse to apply the Simpson holding in the case of Simpson himself. That misconception is the primary subject of this appeal.

Specifically, the judgement below dismissing appellant's

suit as "inequitable" after rendition of a jury verdict in appellant's favor is erroneous for at least six reasons:

(1) It represents the creation of a new affirmative defense which cannot reasonably be read into the Sherman Act, and is thus contrary to the will of Congress and to separation of powers.

(2) It is not consistent with the limitation placed by the Seventh Amendment on the power of a trial judge to review a verdict which is within the range of the evidence, as embodied in Rule 50.

(3) It attributes to the Chancery side of the court a general supervisory power over the law without regard for the jurisdictional bases of equitable relief from the operation of a judgment.

(4) It takes from Simpson the relief accorded him by a higher forum by applying at the trial level the appellate doctrine of "pure prospectivity," which has never been invoked in any federal court to deprive a successful appellant of the fruits of his appeal.

(5) It is based on a finding of "equities" which cannot be sustained on the record of this case, and which is contrary to the announced findings of the Supreme Court with respect to relations between the parties.

(6) It conflicts with the District Court's own ruling on appellee's motion for judgment non obstante verdicto, which was the only appropriate basis for attack on the jury verdict.

appellee a new trial is erroneous for two reasons:

(1) It represents a mere substitution of the court's determination of factual issues for that of the jury where ample evidence was duly admitted to sustain the verdict, which was well within the range of damage figures argued by appellant's counsel. Appellee respectfully submits that recitation by a trial judge of such phrases as "monstrously excessive" is not talismanic in the appellate courts, which should oversee orders for new trial so far as is necessary to preserve the integrity of the jury system.

(2) When the ruling was made the court had before it the affidavits of three jurors solicted by counsel for appellee, seeking to impeach the verdict by revealing the process of deliberation of the jurors. Regardless of whether these were consciously considered by the court below, the fact that they had not been struck at the time it ruled on appellee's motion for a new trial renders its ruling erroneous because of potential prejudice.

* * *

The United States Constitution prohibits the federal courts from refusing to enforce actions which the Congress has established to remedy wrongs done by huge aggregations of wealth against a citizen. Northern Sec. Co. v. United States, 193 U.S. 197, 348-357 (1904).

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facts, subject only to the rigorously limited review developed by the common law. U.S. Const. art. VII. As Simpson has proven every element of a federally created cause of action, he is entitled to legal processes which do not violate his rights so established. Id. art. V.

The Supreme Court in Linkletter v. Walker, 381 U.S. 618, 632 (1965)(denying retroactive application of Mapp v. Ohio), specifically noted the difference between the party who merely proposes a judicial policy and the party who shows the court that his federally created right is being violated.

Here, at the time of the wrong, appellee was violating the antitrust laws by engaging in manifestly coercive conduct which flew in the face of United States v. Richfield Corp., 99 F. Supp 280 (S.D. Cal. 1951), aff'd per curiam, 343 U.S. 922 (1952), and of United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940). Union Oil Company sought to treat independent business as employees under a price fixing scheme which did not tolerate any independence on the part of lessee dealer operators. The Supreme Court, in Federal Trade Comm'n v. Beech-Nut Packing Co., supra, and United States v. Masonite Corp., supra, had taught that price fixing arrangements which effect coercion of independent dealers were violative of the antitrust laws regardless of whether there were any agreements or whether the agreements utilized were couched in terms of agancy or consignment. Union Oil Company was fully subject to the strictures of law as explained in United States v. Parke, Davis & Co., supra. A wrong was done

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Simpson under the antitrust laws, and by Congressional fiat his remedy is certain.

The Supreme Court cannot be presumed to have allowed Union Oil Company to show equities against Mr. Simpson. He lost his business after overt coercive threats had been made, and after he was warned that he did not have the means to sue Union Oil Company. He was told he could have his business if he conformed to Union Oil Company's pricing practices.

The Supreme Court has been outspoken in its declarations that the federal antitrust laws cover coercive arrangements between major oil companies and dealers, who do not bargain as equals. Standard Oil Co. vs. United States, supra; accord, United States v. Richfield Oil Corp., supra; Atlantic Ref. Co. v. Federal Trade Comm'n, 381 U.S. 357 (1965); Federal Trade Comm'n v. Texaco, Inc., 381 U.S. 739 (1965) (per curiam). The judgment below ignores the purpose of the Sherman Act, as enunciated by the Supreme Court, to remedy overreaching by those who possess coercive levers. The economy is for the benefit of all and not only for those who maintain the instruments of control.

The decision below narrowly focuses on, then misinterprets, the last sentence of the Simpson decision. Taken in the context of the last paragraph and of the entire opinion, it was clearly not to be applied against Mr. Simpson. The elementary fact which appellee has persistently ignored is that the Simpson holding overruled nothing. General Electric, 272 U.S. 476 (1926), had been limited to the field of patents in Masonite, supra, and Masonite announced the Sherman Act

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to cover restraints of trade. Antitrust liability was there declared to rest, "not on the skill with which counsel has manipulated the concepts of sale or agency, but on the significance of business practices in terms of restraint of trade." 316 U.S. at 280. Thus General Electric was known not to be decisive in Sherman Act litigation. It would certainly not cover a coercive scheme. See United States v. Richfield Oil Corp., supra. Clearly at no time was the effect of General Electric to allow the subjection of small dealers to a coercive price control program by their landlords.

Only the Supreme Court could make a determination of pure prospectivity of its own decision. The appellate forum alone determine the prospectivity of the rules it announces: as the Supreme Court stated, "We reserve the question . . . " There was thus no power below to enter a judgment dismissing plaintiff's complaint.

But even taking the paradoxical position that the District Court was to determine the prospectivity of the Simpson decision in Simpson's action, there should have been a different result under the tests established in Linkletter v. Walker, supra. The judgment below is simple nonenforcement of federal antitrust law and retards its operation. The Simpson decision would stand as proof that the appellee is correct in its warning to Mr. Simpson, "What can you do about it . . . You haven't got the money to make trouble and fight the Union Oil Company."

The second section of appellee's brief shows that

the Findings of Fact below are erroneous, for they are either in conflict with the Supreme Court's decision in Simpson, are not based on the record, or are irrelevant under the Simpson holding that Simpson's knowledge and consent to the consignment agreement did not bar his cause of action. The District Court relied on findings that Union Oil Company, in the preparation of the Retail Dealer Consignment Agreement Program followed the advice of its General Counsel, who had read General Electric and who authorized the use of the consignment agreements. But whether or not the dealer was to be free in accepting the agreement, or in testing it by experience and later rejecting it, and the role of lease ouster in the program were not subjects of Genral Counsel's advice; he left such matters to marketing.

Union assumed the antitrust risks of the consignment program. The record showed Union as a powerful company which risked Department of Justice complaints in the governments monopoly and price fixing case against it and which utilized consignment despite Congress' recommendation in 1957 that the Department of Justice investigate consignment programs as possible violations of the antitrust laws. Union Oil Company did not tell the investigating House subcommittee that its Retail Dealer Consignment Agreement Program was a mandatory price control program. It had reason to fear that candor would bring about the antitrust consequences which were finally produced in the Simpson decision. Federal Trade Commission action against two major oil companies followed the subcommittee report. As the Court is aware, the case entitled

Federal Trade Comm'n v. Sun Oil Co., 3 Trade Reg. Rep. 24,542 (FTC 1963), was based on the coercive features of a consignment program, see 311 F.2d at 789 n.6, although the Seventh Circuit enforcement order relied on its horizontal aspects, see 350 F.2d 624 (7th Cir. 1965). Union Oil Company was gambling under the antitrust laws and was not acting in reasonable belief that its consignment program was wholly lawful.

In appellant's third section it is argued that the District Court erred in granting a new trial and in not striking the jury affidavits of two jurors and the declaration of a third. The jurors were solicited by defendant, who sought to determine what occurred in the jury room. Such conduct was unethical and the court should have stricken the affidavits. See Southern Pac. Ry. Co. v. Mely, 219 F.2d 199 (9th Cir. 1954). Appellee sought improperly to influence his ruling on the matter for a new trial.

The new trial was granted on an expressed belief in excessiveness of the jury verdict. But the verdict was well within the range of proven damages. Simpson was entitled to damages for a wrong which deprived him of the value of his business. This business was valued on the basis it would have continued at least twenty-four years, based on Simpson's remaining useful life as owner, and the profits established by Simpson in the business were in the record. (See Tr. 274-278) The evidence admitted by the trial court were valuations of Simpson's business of between $147,895.00 and $211,970.00. These were projections made by a qualified Professor of Statistics.

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ARGUMENT

I. THE MANDATE OF THE UNITED STATES SUPREME COURT IN SIMPSON v. UNION OIL COMPANY OF CALIFORNIA DID NOT ALLOW THE DISMISSAL OF APPELLANT SIMPSON'S COMPLAINT WITH PREJUDICE.

A. The Last Sentence in the Simpson Opinion Did Not Apply to the Successful Appellant, Simpson.

1. The courts are prohibited by the Constitution to refuse to enforce a cause of action created by Congress.

a. Under the doctrine of separation of powers, the trial court could not determine whether the Sherman Act, as interpreted by the Supreme Court, should apply to Union Oil Company of California.

Union Oil Company engaged in violation of Section 1 of the Sherman Act when it coerced independent dealer's judgments as to prices, effect a price fixing combination and destroyed the businesses of independent dealers who failed to obey price orders. The courts are without power under the United States Constitution, requiring the separation of powers between legislature and the Courts to take away or

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render nugatory a federally created right to obtain damages for an injury from a defendant's violation of the Sherman Act.

It was stated in Northern Securities Co. v. United States, 193 U.S. 197 (1903), in answer to the argument that the Sherman Act could not interfere with state charters:

> "By its very terms the act regulates only commerce among the states, and with foreign states. Viewed in that light, the act, if within the powers of Congress, must be respected, for, by the explicit words of the Constitution, that instrument and the laws enacted by Congress in pursuance of its provisions, are the supreme law of the land 'anything in the laws of any state notwithstanding' -- supreme over the states, over the courts, and even over the people of the United States -- the source of all power under our governmental system in respect of the objects for which the national government was ordained. An act of Congress constitutionally passed under its power to regulate commerce among the states and with foreign nations is binding upon all; as much so as if it were embodied, in terms, in the Constitution itself. Every judicial officer, whether of a national or a state court, is under the obligations of an oath so to regard a lawful enactment of Congress. Not even a state, still less one of its artificial creatures, can stand in the way of its enforcement. If it were otherwise, the government and its laws might be prostrated at the

feet of local authority. Cohen v. Virginia, 6 Wheat. 264, 385, 414, 5 L. 3d. 257, 286, 293. These views have been often expressed by this court." 193 U.S. at 333.

The right to private relief for a wrong done under the Clayton Act is designed to give a federal remedy for personal injury caused by violators of the antitrust laws, against whom the maintenance of a private suit is particularly difficult. See Cong. Rec. 2456 (1890)(remarks of Senator Sherman)

As stated in City of Atlanta v. Chattanooga Pipe & Foundry Co., 127 Fed. 23 (6th Cir. 1903), aff'd, 203 U.S. 390 (1906):

> "That such a plaintiff is entitled to recover the damages thus sustained in his business, whatever its character, would seem to be the plain purpose of the seventh section of the law of Congress, under the logic of the decision in Addyston Pipe Co. v. United States. It is possible to so construe this seventh section as to devitalize this section by confining compensatory relief to such relief to such persons as shall sustain injury in some interstate business whose volume or profit has been diminished. But this construction does not seen consistent with the wide economic purposes of Congress, as manifested by the whole tenor of the act. Congress evidently foresaw the wholesome effect of pecuniary responsibility for injuries resulting from such forbidden combinations and the courts should not devitalize the remedy by strained interpretations calculated to encourage

to 'any person' 'injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act.' If Congress had the power to declare unlawful a combination which was intended to restrain interstate commerce by enhancing the value of a commodity when the subject of interstate commerce, it had the power to give a compensatory remedy to any person directly affected by the unlawful agreement.

* * *

"... The seventh section alone gives any remedy to one injured by such a forbidden combination or contract, and that measures the relief by the 'damages by him sustained,' costs of suit, and his reasonable attorney's fees. The remedy is not given to the public, for no one may bring the action save the person 'who shall be injured,' etc., and the recovery is for the sole benefit of the person so injured and suing." 127 Fed. at 27-29.

Appellant's record shows that he has established each element of his cause of action under Section 4 of the Clayton Act allowing him recovery of damages. The Supreme Court has held that Union Oil Company violated the Sherman Act and the jury found that Mr. Simpson was damaged by said violation in the amount of $160,000.00. Congress alone can provide for remedial relief under the Sherman Act. The Courts are required

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to enforce Sherman Act remedies. The Supreme Court may not be presumed to have usurped Congress' role as the creator of wrongs and remedies arising thereby. As stated in _Bruce's Juices_ v. _American Can Company_, 330 U.S. 743 (1947):

> "It is clear Congress intended to use private self-interest as a means of enforcement and to arm injured persons with private means to retribution when it gave to any party a private cause of action in which his damages to be made good threefold, with costs of suit and reasonable attorney's fees." 330 U.S. at 751-752.

Congress has declared the law and established the remedy; it is respectfully urged that the courts are not to interfere with this Congressional scheme. See _Utah Pie Co._ v. _Continental Baking Co._, 386 U.S. 685 (1967); _Klor's, Inc._ v. _Broadway-Hale Stores, Inc._, 359 U.S. 207 (1959); _Silver_ v. _New York Stock Exchange_, 373 U.S. 341 (1963); _Radovich_ v. _National Football League_, 352, U.S. 445 (1957); _Mandeville Island Farms_ v. _American Crystal Sugar Co._, 334 U.S. 219 (1948); _Prospective Overruling & Retroactive Application In The Federal Courts_, 71 _Yale L. J._ 907, 930-933 (1962).

b. Simpson's right to relief has been denied him despite a proven wrong and damages suffered. Such denial deprives Simpson of due process of law under the United States Consti-

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tution, Fifth Amendment.

The result below has completely deprived Mr. Simpson of his remedy. See Bruce's Juices v. American Can Company, supra. Simpson's only source of recompense was an action under the antitrust laws, and to deny him that redress after the statute of limitations has run is to deprive him of all rights to relief arising from a proven wrong. It is respectfully submitted that such a deprivation of rights violates due process of law. A person injured within the meaning of federal law cannot be constitutionally denied his existing remedy. See Brinkerhoff-Faris Trust and Savings Co. v. Hill, 281 U.S. 673 (1929). The law was certain that a person who has had his business destroyed by a violation of the antitrust laws possesses a remedy. This remedy cannot be retroactively denied appellant, who has been declared the victim of a compensible wrong in the highest court of the land.

c. A jury trial must be granted on all facts affecting Simpson's right to relief.

That the result below is based upon findings of fact by the trial court in a jury action, it is respectfully urged, further shows that the Supreme Court mandate did not sanction the result below. The necessary result of what occurred is to place the judiciary above the jury as the trier of fact, but under our constitutional system the jury alone determines the facts upon which liability or nonliability is determined. Only where there appears retrospectively from want of evidence to have been no issue requiring factual deter-

mination may a jury verdict be ignored and a party's complaint dismissed. Compare Baltimore & Car. Line v. Redman, 295 U.S. 654 (1935), with Slocum v. New York Life Ins. Co., 228 U.S. 364 (1913). The narrow window which Rule 50(b) places in the Seventh Amendment does not admit general review of "equities." See Montgomery Ward & Co. v. Duncan, 311 U.S. 243, 251 (1940)(by implication).

It is respectfully urged that the judiciary has no general supervisory power over the jury under our constitutional system. The ascendancy of the jury system over trials in which persons and their civil causes were not judged by their peers would seem a fundamental benefit achieved by the American Revolution. It is ingrained in our Constitution, which expressly forbids a court to disregard a jury verdict except as limited by the development of the common law. U.S. Const., amend. VII.

> "Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right should be scrutinized with the utmost care." Dimick v. Schiedt, 293 U.S. 474, 486 (1935).

The result below is not consistent with this stricture. See Fitzgerald v. United States Line Co., 374 U.S. 16, reh. denied., 375 U.S. 870 (1963); Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959); cf. 28 U.S.C. Sec. 2072 (1964); Fed. R. Civ. P. 38(a); Galloway v. United States, 319 U.S. 372 (1943); Hodges v. Easton, 106 U.S. 408 (1882).

It is respectfully submitted, therefore, that the United

with means of retribution when they are the victims of ouster to support price control programs, and the courts may not constitutionally vitiate these congressional rights. U.S. Const. art. I, Sec. 1; id., art. III, Secs. 1 & 2; id., amend. V & VII. The interpretation given to the last sentence in the Simpson case by the court below, therefore, imputes to the Supreme Court a sweeping constitutional revision which would obliterate Mr. Simpson's federally created rights. Such an interpretation, which is completely contradictory to and inconsistent with the Supreme Court's opinions in antitrust litigation, must be faulty. The United States Supreme Court did not anticipate creating a situation where a litigant in pursuing his rights under a federal law must watch a jury verdict being taken away from him by a federal court after he has proven each and every element necessary to sustain his cause of action. Much less did it intend, when it remanded the case, to deprive the litigant whose very cause of action it sustained of a verdict based on the law of his case.

d. The Supreme Court cannot be presumed to allow equities to a coercive scheme carried out by appellee.

The Supreme Court has been outspoken in its declaration that the antitrust laws cover the restrictions in trade and commerce carried out as a result of the inequality of bargaining power between service station dealers and the major oil companies in the United States. In addition to the

Simpson opinion, see Atlantic Ref. Co. v. Federal Trade Comm'n, 381 U.S. 357 (1965), where the Supreme Court stated:

> "Certainly there is 'warrant in the record' for the findings of the Commission here. Substantial evidence supports the conclusion that notwithstanding Atlantic's contention that it and its dealers are mutually dependent upon each other, they simply do not bargain as equals. Among the sources of leverage of Atlantic's hands are its lease and equipment loan contracts with their cancellation and short-term provisions. Only last Term, we described the power implications of such arrangement in Simpson v. Union Oil Company of California. 377 U.S. 13, 84 S.Ct. 1051, 12 L.Ed 2d (1964), and we need not repeat that discussion here. It must also be remembered that Atlantic controlled the supply of gasoline and oil to its wholesalers and dealers. This was an additional source of economic leverage, United States v. Lowe's, Inc., 371 U.S. 38, 45, 83 S.Ct. 97, 102, 9 L.Ed 2d 11 (1962), as was its extensive control of all advertising on the premises of its dealers." 381 U.S. at 368.

Accord, Federal Trade Comm'n v. Texaco, Inc., 381 U.S. 739 (1965), vacating per curiam 336 F.2d 754 (D.C. Cir. 1964); United States v. Richfield Oil Company, 343 U.S. 92 (1952), aff'g per curiam 99 F. Supp. 280 (1951).

It is respectfully submitted therefore that the United

means to retribution when they are the victims of lease ouster to support price control programs, and that the doctrine of separation of powers the courts may not constitutionally vitiate these congressional rights. See U.S. Const. art. I, Sec. 1, id., art III, Secs. 1 & 2. The interpretation given below to the last sentence in the Simpson case therefore imputes to the Supreme Court an unconstitutional interference with Mr. Simpson's federally created rights and is manifestly inconsistent with the Supreme Court's realistic view of the dealer's bargaining position with the major oil companies.

2. <u>The decision of the United States Supreme Court in Simpson v. Union Oil Company reserving prospectivity did not apply to Simpson as a matter of reasonable interpretation</u>.

The Supreme Court decision itself does not authorize, and is not susceptible of authorizing, the action taken below. The remand was for a jury trial in which Simpson could establish his damages based upon the violation of Section 1 of the Sherman Act by Union Oil Company of California, as found by the Supreme Court. Nowhere in the mandate is there a license for the District Court to refuse to enforce a jury verdict which was entered in accordance with the Supreme Court ruling of April 20, 1964. It is respectfully urged that the last sentence on the Simpson opinion refers only to

a reservation by the Supreme Court itself as to the effect the *Simpson* decision would have upon *other* litigants in *other* factual situations.

The United States Supreme Court has simply asserted its appellate jurisdiction to govern the scope and extent of its rule against price fixing by consignment devices as applicable through the entire commercial world. This is made clear by contrasting the majority decision with the dissenting opinion of Justice Stewart. The simple answer of the majority to Justice Stewart's contention that the Supreme Court was injecting "severe uncertainty into commercial relationships established in reliance" upon its prior decisions was that the equities could be shown in other consignment type cases as they arose on their factual records. This is the correct interpretation for the following reasons:

(1) The Supreme Court found a violation of the Sherman Act through the use of price fixing agreements, coercively employed. *Cf.* *Federal Trade Comm'n* v. *Beech-Nut Packing Co.*, 257 U.S. 441 (1922). The Supreme Court did not thereupon allow a trial in which a litigant proves a cause of action under a federal statute enacted for his protection by proving the loss of his business by coercion and ouster only to have the cause of action not enforced.

(2) The last sentence uses the words "damage suits". It is respectfully urged that that phrase shows the obvious purpose of the Supreme Court to reserve equities to other cases, in which the consignment device

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may have been employed.

(3) The Supreme Court did not use the term "purely prospective". The Supreme Court utilized the word "prospective" in its last sentence. This means that the decision applied to the parties before it. See Linkletter v. Walker, 381 U.S. 618 (1965), where the Court at 622-623 set forth its terminology:

> "Initially we must consider the term "retrospective" for the purposes of our opinion. A ruling which is purely prospective does not apply even to the parties before the Court. See, e.g., England v. Louisiana State Board of Medical Examiners, 375 U.S. 411, 84 S. Ct. 461, 11 L. Ed. 2d 440 (1964). See also Great Northern Ry. Co. v. Sunburst Oil & Refining Co., 287 U.S. 358, 53 S. Ct. 145, 77 L. Ed. 360 (1932). However, we are not here considered with pure prospectivity since we applied the rule announced in Mapp to reverse Miss Mapp's conviction. That decision has also been applied to cases still pending on direct review at the time it was rendered." (omitting Court's footnotes).

(4) The interpretation given by the court below denies in effect, that the Supreme Court rendered a decision as to the parties before it. It is the universal rule of the courts that their decisions resolve the disputes of the parties before them. The England and Sunburst cases, cited obiter in Linkletter v. Walker, supra, are not to the contrary. Even if the Supreme Court had overruled

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Simpson, the district court's action would be without precedent in the federal system./1 Cf. Annot., 14 L. Ed. 2d 993, 1002 (1966). For illustration of the distinction between the successful appellant in the federal courts and subsequent litigants, compare Nye v. United States, 313 U.S. 33 (1941), with Warring v. Colpoys, 122 F.2d 642 (D.C. Cir. 1941).

The effect of the trial court's order below was to make the Supreme Court decision purely gratitous, solely advisory and without remedial effect. This interpretation is clearly erroneous and cannot be sustained. Mr. Simpson lost his business and filed his complaint under the antitrust laws. It is that complaint and that dispute which were determined by the Supreme Court mandate in this case and which finally resuled in the jury determination. A decision on the merits requires that the party bringing the case obtain the benefits of the decision it has won. Dooling v. Overholser, 243 F.2d 825, 829 (D.C. Cir. 1957)(reviewing authorities); Molitor v. Koveland Community Unit Dist., 18 Ill. 2d 11, 163 N.E.2d 89, 97 (1959)(by implication).

(5) The interpretation below is contrary to sound judicial administration and to public policy. The Supreme Court has stated that it would not render a decision retroactive when to do so would interfere with the integrity of judicial process. Linkletter v. Walker, supra. Clearly,

/1 Hanover Shore, Inc. v. United Shoe Mach. Corp., 377 F.2d 776 (3d Cir.) cert. granted, 88 S.Ct. 86 (1967), involves retroactivity of a decision obtained by the government in a subsequent suit by a different litigant.

ment of the Sherman Act through private action.

In Simpson, unlike Linkletter, the Court is enforcing the federally created right itself, not delving into the realm of judicial administration. Mr. Simpson's position is thus that of Mrs. Mapp, rather than that of Victor Linkletter. But even if this were not so, sound judicial administration requires reversal, for failure of the federal courts to enforce the verdict in Simpson's favor is contrary to the prevailing test as stated in Linkletter.

> "...[W]e must then weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether prospective operation will further or retard its operation." 381 U.S. at 629.

The refusal of the federal court below to enforce the verdict in favor of Simpson will, without question, retard enforcement of the antitrust laws. It will allow major oil companies and especially this defendant to show the dealers that the antitrust laws are a flimsy thing, and that dealers can obtain no relief or remedy even after a Supreme Court holding of violation. This result is completely antagonistic to the will of Congress and certainly cannot be sanctioned as a prevailing doctrine.

Pure prospectivity here interferes also with proper administration of justice and the integrity of the federal court system. One powerful corporation is allowed to assert

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its immunity to antitrust litigation and make Simpson an example to the class that it is indeed foolish to sue the major oil companies.

B. Even Assuming the Language of the Supreme Court as to Prospectivity Was Applicable to Mr. Simpson, the Trial Court Had No Jurisdiction Under That Mandate to Dismiss Plaintiff's Complaint, Since the Matter Was Reserved to the Supreme Court of the United States.

It is respectfully submitted that, assuming the last sentence of the Supreme Court's opinion did refer to *Simpson* v. *Union Oil Co.*, the Supreme Court only intended to review the record itself before a final decison as to prospectivity was made. The result below was not sanctioned. Whether or not the Supreme Court decison in *Simpson* is retrospective or prospective is a matter for determination by that forum; it alone has power to determine the effect of its opinion.

The Supreme Court expressly reserved to itself alone the effect of the *Simpson* decision. The trial court could not convert a doctrine of appellate review into an order or judgment denying Simpson relief and awarding costs against him. 21 C.J.S. *Courts* Sec. 194 (1940, Supp. 1967); 20 *Am. Jur.* 2d Courts Sec. 233, at 562 (1965, Supp. 1967). The most the trial court should have been done was to allow Union Oil Company to open the record for any taking of evidence that would aid or assist the Supremem Court in determining whether or not there were any equities in accordance with its opinion.

II. FINDINGS OF FACT BELOW UPON WHICH THE JUDGMENT DISMISSING SIMPSON'S COMPLAINT WERE BASED ARE IMMATERIAL OR ERRONEOUS. THERE ARE NO EQUITIES IN THIS RECORD IN FAVOR OF DEFENDANT UNION OIL COMPANY.

The findings of fact below are in conflict with the United States Supreme Court opinion in Simpson v. Union Oil Co., 377 U.S. 13 (1964), or are immaterial, or are erroneous:

1. Finding of Fact Number 1:

Finding of Fact Number 1 is in conflict with the Supreme Court decision. The purpose of Union Oil Retail Dealer Consignment Agreement program was to control retail prices. (See R. 223-224) The Supreme Court stated in pertinent part as follows:

> "By reason of the lease and 'consignment' agreement dealers are coercively laced into an arrangement under which their supplier is able to impose noncompetitive prices on thousands of persons whose prices might otherwise be competitive.
>
> "The evil of this resale price maintenance program . . . is its inexorable potentiality for an even certainty in destroying competition in retail sales of gasoline by these nominal 'consignees' who are in reality small struggling competitors seeking retail gas customers."

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The record does not support a finding that the retail dealer consignment agreement program was used other than to fix and control the dealers' prices. Plaintiff's Exhibit Number 3, dated March 9, 1955, is decisive. This letter states, in part:

> "So there will be no misunderstanding, the following information is presented to supplement the information contained in our first letter: A change in our selling price is necessary because of our two new Gasolines whenever we decide to drop our fair trade price, appoint our dealers as consignment agents and nominate the price for which they are to sell our Gasoline." (R. 231)

2. Finding of Fact Number 2:

Finding of Fact Number 2 stating that the General Counsel of Union Oil Company was entirely satisfied that under United States v. General Elec. Co., 272 U.S. 476 (1926), and decisions following consignment and the proposed method of merchandising were lawful in every respect and would not violate the antitrust laws, is not in accordance with the record. It is respectfully submitted that Mr. Gibbons, the General Counsel referred to in Findings of Fact No. 2 did not testify consistently with that finding. The substance of Mr. Gibbon's testimony is that he was asked by Mr. A. L. Stewart, Vice President in charge of Marketing,

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about 1954, whether or not Union Oil Company could consign gasoline and tell the dealers what they should sell gasoline for. (Tr. 1141-1444) Mr. Stewart and Mr. Gibbons did not discuss what Union Oil Company would do as to dealers who do not want to sell under a consignment agreement (Tr. 1152), and did not discuss the effect of the one-year lease and of Union's ability to use it as a means of obtaining consignment agreements from the dealers and subsequent compliance therewith. (Tr. 1152, 1164) There was no discussion as to the ability of a dealer to convert to purchase and sale should he disagree with the consignment agreement policies. (Tr. 1176) There was no discussion as to whether Union Oil Company had the right under the dealer consignment program to threaten dealers that they would do everything in their power to force the dealer to charge the retail prices told to be posted under the consignment programs. (Tr. 1180) According to the testimony of Mr. Gibbons these matters were left to marketing for implementation. (Tr. 1176) He could not know whether even the cases he did read were apposite to Union's actual practices. Clearly, the method of merchandising actually used by Union Oil Company involved crucial features discussed in the Supreme Court opinion which were not even the subject of legal approval by Mr. Gibbons. There are at least eight elements of the retail dealer consignment program, as follows:

(1) The retail dealer consignment agreement itself. This agreement was not offered by allowing the dealer to accept the agreement on the basis of his inde-

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pendent judgment. Union Oil Company required the dealer to accept consignment (Tr. 372, 391-395)

(2) Union Oil determined to do away with dealers, independent decisions in the matter, requiring dealers to agree to retail dealer consignment agreement as a condition to lease occupancy. This was stipulated. (Tr. 391)

(3) Union Oil adopted a mandatory price control program and did not allow a dealer lease renewal unless he agreed to remain a consignee whose prices were fixed by Union Oil Company. This is also stipulated. (Tr. 395) In other words, there was no opportunity for the dealer to change his decision and to become a purchase-and-sales dealer or otherwise acquire gasoline by Union Oil Company.

(4) Union Oil utilized the consignment agreement to dictate prices and set in motion an arrangement under which it would impose non-competitive prices on thousands of persons whose prices might otherwise be competitive. Thus, Union Oil Company told the dealer that his price was to be "higher than major competition or equal to those charged by Standard Stations, Inc." (See Pl. Ex. Nos. 38, 46; R. 75; cf. R. 232, 247, 256, 283)

(5) The dealers were told that Union Oil Company would do all in its power to compel them to follow the consignment price. (Tr. 606-607: compare Tr. 719); Answer to Amended Compalint, R. 93)

(6) Union Oil would inform the dealers that if they did not go along with the authorized price that a one-year lease renewal would be refused. (See Tr. 617, 708,

720-722)

(7) Union Oil Company would refuse to issue a lease to the dealer who decided to charge other than authorized prices. (By stipulation, Tr. 391-395) It is stipulated, of course, that Mr. Simpson's lease was not renewed because he would not agree to charge the consignment prices. (Tr. 471)

(8) The dealers were told that they had better not sue Union Oil Company, that they did not have enough money to litigate with Union, and that other dealers had been thrown out bodily when they failed to leave the service station site at Union Oil's demand. (Tr. 622-623)

Thus, it is respectfully urged that Mr. Gibbons' testimony reflected *only upon the first factor* above, the Retail Dealer Consignment Agreement itself and, that he has in fact admitted during cross-examination, the coercive features of the program were not subject to his analysis, being the result of appellee Union Oil Company's implementation of the program through its "marketing people".

Moreover, the findings could not state that counsel studied the then state of the antitrust laws, for cross-examination of Mr. Gibbons clearly showed he did not analyze *United States* v. *Richfield Oil Corp.*, *supra*, in terms of Union Oil's consignment program (Tr. 1159), that he did not rely on the case of *Federal Trade Comm'n* v. *Beech-Nut Packing Co.*, *supra*, (Tr. 1181) and that he did not believe the so-called tie-in cases to be applicable. (Tr. 1169) Further, the Supreme Court opinion in *United States* v. *Masonite Corp.*, 316 U.S. 265, 280 (1942) that "so far as the Sherman Act

is concerned the result must turn not on the skill with which counsel has manipulated concepts of 'sale' agency, but on the significance of the business practices in terms of restraint of trade", was thought by Mr. Gibbons not to apply to Union Oil's proposed consignment agreement program because Masonite involved a horizontal conspiracy. (Tr. 1171-1173) This is at best legal attention only to the agreement itself.

It is thus respectfully submitted that the "then state" of the antitrust laws was not in fact analyzed as applicable to Union by General Counsel of defendant, wherefore Finding of Fact Number 2 cannot be supported.

3. Finding of Fact Number 3

Finding of Fact Number 3 is in direct conflict with the Supreme Court's decision in this case. This Finding states that the retail dealer consignment agreement used by Union Oil Company is substantially the same as the consignment agreement and arrangement of the General Electric Company involved in United States v. General Elect. Co., 272 U.S. 476 (1926). But the Supreme Court, on the contrary, said clearly that the retail dealer consignment agreement "somewhat parallels" the General Electric agreement, and determined that Union was seeking extension of the General Electric rule to protect its distinctively coercive program. See Simpson, supra, at 24. The Supreme Court went out of its way to indicate some of the respects in which it considered the Union Oil Company agreement different from the General Electric agreement. Id., 23 n.10. It noted that

the General Electric consignor assumed all the risks of fire, flood or obsolescene, whereas Union Oil did not. It noted that General Electric paid all taxes assessed on the stock of lamps, whereas Union Oil Company paid only property taxes. It noted that General Electric carried "whatever insurance is carried" on the stock held by the consignees while Union Oil Company apparentely was not obligated to carry any insurance. Significantly, Justice Stewarts dissent disagreed with the majority's observation that Union Oils consignment agreement failed to follow General Electric's and placed most of the risks on the consignee.

4. Finding of Fact Number 4:

Finding of Fact No. 4 is in conflict with the facts indicated and discussed under Findings of Fact Number 2, supra. The important matters of implementation of the Retail Dealer Consignment Agreement program were left to marketing and were not discussed with General Counsel. Finding of Fact No. 4 is thus in conflict with Mr. Gibbons' testimony at Tr. 1176.

5. Finding of Fact Number 5

Finding of Fact Number 5 is immaterial and irrelevant, and is contradictory to and inconsistent with the Supreme Court decision in Simpson. This Finding deems relevant the fact that plaintiff was entirely familiar with the form of the consignment agreement and with the form of lease used by defendant. But the plaintiff's knowledge or lack of knowledge of these matters was directly determined by the Supreme Court in Simpson to be irrelevant to plaintiff's

cause of action under Section 4 of the Clayton Act. See Findings of Fact Number 6, below.

6. Finding of Fact Number 6

Finding of Fact Number 6 is immaterial, irrelevant and conflicts with the Supreme Court decision in Simpson. This Honorable Court's opinion in Simpson v. Union Oil Co., 311 F.2d 764 (9th Cir. 1963), held that Simpson's knowledge that by obtaining the lease he would also have to sign a consignment agreement, and his subsequent signing of the agreement with such knowledge raised the doctrine of "Consent", and therefore destroyed his cause of action. But the Supreme Court was unanimous in holding that there was actionable wrong or damage to Simpson despite Simpson's knowledge of or consent to defendant's unlawful price control program. It is noted that the exclusive requirements contract struck down in Standard Oil Co. v. United States, 337 U.S. 293 (1949) were not saved because dealers need not have agreed to them, but could have gone elsewhere. The Supreme Court stated that if that were a defense, a supplier could regiment thousands of otherwise competitive dealers in resale price maintenance programs merely by fear of nonrenewal of short term leases. Simpson, supra, 377 U.S. at 17. The Supreme Court pointed out that United States v. Parke, Davis & Co., 362 U.S. 29 (1960), made clear that a supplier may not use coercion on its retail outlets to achieve resale price maintenance. The Court held that the Retail Dealer Consignment Agreement was a retail price agreement, that it was used coercively, and that it promised to be equally if

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not more effective in maintaining gasoline prices than were the Parke, Davis techniques in fixing monopoly prices on drugs. Simpson, supra, at 17.

The purport of Finding of Fact Number 6 is to make material plaintiff's signing of a lease and a consignment agreement and his familiarity with the terms and conditions of those agreements. Clearly, this is immaterial and irrelevant to plaintiff's cause of action, which is based upon injurious impact arising from Union Oil Company's promulgation and enforcement of a retail price maintenance program coercively used.

7. Finding of Fact Number 7:

Finding of Fact Number 7 is in direct conflict with the Supreme Court decision in Simpson. The Supreme Court has held that Union Oil Company engaged in coercive conduct in that its consignment agreements providing for retail price control were coercively used. As heretofore indicated, the dealer lost all freedom of choice as a result of Union Oil's conduct, since (1) a dealer could become a lessee only by agreeing to sign the consignment agreement; (2) he had no ability to secure another type of arrangement; (3) he was subjected to coercive statements and threats if he did not agree to follow Union's designated consignment prices; and (4) his lease would not be renewed if sought to establish his own retail prices. These are matters necessarily determined in the Simpson decision and preclude reaching a contradictory result on any finding that there is freedom of choice or free judgment exercised by plaintiff pursuant to

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the defendant's unlawful price control program. It is economic duress or compulsion to utilize reversionary property interests to coerce judgments with respect to prices and products. *Northern Pac. Ry. Co*. v. *United States*, 365 U.S. 1 (1958); *United States* v. *Richfield Oil Co*., 343 U.S. 92 (1952).

Cf. *Times-Picayune Publishing Co*. v. *United States*, 345 U.S. 594 (1953), where the Court stated:

> "By conditioning his sale of one commodity on the purchase of another, a seller *coerces* the abdication of the *buyers' independent judgment* as to the 'tied' product's merits and insulates it from the competitive stresses of the open market." 345 U.S. at 603 (emphasis supplied).

As necessarily determined by the Supreme Court in this action, Union Oil used force and compulsion similar to that in *United States* v. *Richfield Oil Co*., 99 F. Supp. 280, 297 (C.D. Cal. 1951), where the court concluded:

> "(4) The 24-hours' termination clause has been used as an instrumentality to force upon the lessee of L-O [leased out] stations illegal restrictions as to the types of petroleum and sponsored tires, batteries and accessories to be handled on the premises."

In Simpson's case,

> "[b]y reason of the lease and 'consignment' agreement, dealers are coercively laced into an arrangement which their supplier is able to impose

noncompetitive prices on thousands of persons whose prices otherwise might be competitive." 377 U.S. at 21.

8. Finding of Fact Number 8:

Finding of Fact Number 8 is immaterial and irrelevant, is in conflict with the decision of the Supreme Court in Simpson and is factually incorrect for the reasons set forth in discussion of Findings of Fact Numbers 6 and 7. The truth of the matter is, however, that Mr. Simpson did follow the Union Oil consignment prices for the most part until the March 1958 price dispute. (See Tr. 796-796)

9. Finding of Fact Number 9

Finding of Fact Number 9 is not supported by the record, is mistaken, is in conflict with the Supreme Court decision in Simpson and contradicts the jury verdict in favor of Simpson. The reason Union Oil Company refused to renew Mr. Simpson's lease was because it was carrying out an unlawful price control program and pursuant to that program it would not allow Mr. Simpson to be a conspicuous example to other dealers who might desire to charge retail prices in accordance with their independent judgment. Finding of Fact Number 9 completely ignores the threats made to Mr. Simpson, the attempt to have Mr. Simpson follow Union Oil's prices under the offer of lease renewal if he did so, and the threats to Mr. Simpson that he had better not engage in litigation against Union Oil Company. (Tr. 617-623) The jury verdict conclusively establishes that Mr. Simpson suffered damage by the acts of Union Oil Company. This finding stands as a

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unwarranted re-examination of facts found by the jury and is therefore erroneous.

Further, as heretofore seen, General Counsel's opinion that the consignment agreement was lawful does not meet the issue as to whether or not Union did believe that prices under the agreement could lawfully be enforced by lease non-renewal and by threats against the dealers. Further, explicit in the Supreme Court opinion is a determination that Union's refusal to renew leases, enabling it to enforce price fixing orders, is a coercive device, is hence unlawful, and allows the party subject to such coercive conduct a right to his damages. Since Finding of Fact Number 9 purports to immunize Union Oil Company from an action to redress the wrong it committed it is in direct conflict with the Supreme Court decision finding an _actionable wrong_ to Simpson.

10. Finding of Fact Number 10.

Finding of Fact Number 10 is immaterial, irrelevant and in direct conflict with United States Supreme Court decision.

As heretofore indicated in discussing Findings of Fact Numbers 6, 7 and 8, whether or not plaintiff breached his contractual duties is in conflict with the Supreme Court decision. Further, Finding of Fact Number 10 is incorrect since Mr. Simpson made it clear that he did not want consignment. (Tr. 608-609) It is noted that under general law a factor may at any time renounce an agency. See 35 **C.J.S.** _Factors_ Sec. 7 (1960, Supp. 1967).

11. Finding of Fact Number 11

Finding of Fact Number 11 is in conflict with the

Simpson decision, and is incorrect as a matter of law and of fact. It is respectfully submitted that the teachings of General Electric were as set forth in the Simpson decision. The Supreme Court in Simpson stated that General Electric, involving patents, was not apposite to the special facts in Simpson. The Court pointed out that General Electric stood within a series of cases which allowed price fixing in the marketing of patented articles, that patent law was the ratio decidendi in General Electric, and that Union's attempted extension of these decisions to the area of the general marketplace was inappropriate.

It is apparent that United States v. Masonite Corp., 316 U.S. 265, 276-278 (1942), completly undermined any contention that the consignment form is pivotal by authority of General Electric, and put businessmen on notice that their programs would be viewed under the test of "not on the skill with which counsel has manipulated the concepts of sale and agency but on the significance of the business practices in terms of restraint of trade" 316 U.S. at 280. Furthermore, United States v. Socony Vacuum Oil Co., 310 U.S. 150, 221-222 (1940), made it clear that Section 1 of the Sherman Act does not tolerate agreements for retail price maintenance. Nor could a company with the substantial number of retail outlets and real property interests held by Union Oil Company tie price fixing agreements to the leasing of property. See Northern Pac.Ry. Co. v. United States, 356 U.S. 1 (1958); United States v. Richfield Oil Company, 343 U.S. 922 (1952), aff'g per curiam 99 F. Supp. 280 (1951).

It becomes clear upon examination of the foregoing authorities that the general and uniform view as expressed in appellate opinion was that the 1926 decision of the Supreme Court in General Electric was applicable only to in patent cases and was not authority as to price fixing arrangements in non-patented fields. Indeed, this court in Simpson assumed that the retail dealer consignment agreement program was unlawful, 311 F.2d at 767, and the district court's views initially were the same. (See R. 396, 399) Mr. Joseph Alioto, a prominent member of the antitrust bar, gave his expert opinion that counsel in analyzing the lawfulness of the Union Oil Company consignment agreement program should have examined the tie-in cases, refusal to sell cases, and the use of cancellation or refusal to renew cases, to produce a realistic judgment of the law, and that it was unreasonable not to do so. (Tr. 1442-1446) Since Mr. Gibbons testified that he did not explore these lines of cases, it is submitted that Mr. Gibbons' research was faulty. His cursory analysis of the state of the antitrust laws does not permit the conclusion that defendant's General Counsel acted reasonably and justifiably, as is set forth in Finding of Fact Number 11.

12. Finding of Fact Number 12

Finding of Fact Number 12 is incorrect and immaterial. United States v. Richfield Oil Company, gave notice that one could not use short-term leases to control the independent dealer's decisions as to prices and products. Judge Yankwich decided in 1951 that the dealer's judgment as an in-

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dependent businessman could not be controlled by his supplier's use of short-term leases, 99 F.Supp. 280. This opinion was affirmed per curiam, 343 U.S. 922 (1952). Mr. Gibbons gave no opinion as to the use of the short-term lease to require the signing of consignment agreements and the obeying of consignment prices. This was "left to marketing". Finding of Fact Number 12 is incorrect.

In 1955 Subcommittee No. 5 of the Select Committee on Small Business of the House of Representatives recommended to the major oil companies that they issue three-year leases. (See Pl. Ex. 75 for ident., Tr. 1278) Further, at the time the consignment agreement program was promulgated, Union Oil Company was defending itself against charges by the United States that it had conspired to monopolize the petroleum industry in the Pacific States area and was fixing prices with major oil companies. (Def. Ex. P.) Union's consignment program received the attention of Subcommittee No. 5 in January, 1957. The Subcommittee undertook at this time to investigate and study the factors which since the hearings in 1955 might tend to impede the normal operations, growth and development of distributors, jobbers, consignees and retailers of petroleum and allied products, including automotive equipment and tires, tubes, batteries and accessories. The Subcommittee issued its interim report on August 14, 1957. *H.R. Rep. No.* 1157, 86th Cong., 1st Sess. (1957). The report specifically covered the investigation and complaints of price manipulations as practiced by some suppliers through company-owned, consignment or commission-operated outlets. The

Interim Report specifically referred to the testimony of Mr. Victor R. Hansen, Assistant Attorney General in charge of the Antitrust Division, Department of Justice, who testified directly,

> "Another issue relating to price fixing concerns certain of the practices which the major companies have used to preserve their tank-wagon price structure; for example, the placing of the dealer on a commission of consignment agency basis, which narrows his normal margin of profit and effectively fixes the retail price. This rather widespread practice is now directly at issue in the west coast oil case, specified in the amended complaint filed August 24, 1956. The problem of wholesalers' discriminating in prices between dealers is also at issue in that same case." Id. at 24.

This testimony is referred to in the United States Supreme Court decision, 377 U.S. at 19. Thus, at the very time Union Oil Company was fixing resale prices, it was in issue with the Department of Justice in the West Coast Oil case or using consignment to preserve the oil company's tank-wagon price structure. The prayer in the amended complaint in United States v. Standard Oil Co, supra, specifically asked:

> " ... that each defendant major [oil company] and each of its subsidiaries be enjoined from the operation, management or control of any service

station and from engaging in the business of selling refined petroleum products at retail even through its own employees or by any other persons designated as agents, consignees, or managers ... " (Def. Ex. P, para. 17, p. 47)

Subcommittee No. 5 in its Interim Report of August 14, 1967, had requested:

"... The Department of Justice [to] investigate the present influence of consignment, commission and company-operated stations in price leadership, maintenance or fixing, or in price discrimination against independent lessee-dealers, as possible violations of the antitrust laws." (Pl. Ex. 80, p. 17)

Thus by August 1957 Union Oil Company was well aware that its consignment agreement program was the subject of Congressional inquiry and of a demand for Department of Justice investigation. The testimony of Union Oil Company's General Sales Manager, Mr. Rath, before Subcommittee No. 5 was part of the Simpson record.(R. 115-178) This testimony shows that Mr. Rath withheld from the Subcommittee the full purpose of the Union Oil Company consignment dealer program and the means used, i.e., that it was a mandatory program. Mr. Rath gave confusing testimony to the effect that the dealer was free to go on purchase and sale if he desired. (R. 147-150) This explanation of Union Oil's consignment program, is of course, contrary to what happened to Mr.

Simpson and shows, it is respectfully urged, that Union Oil believed the wisest course to follow was to withhold the mandatory nature of the program from an investigating body of the United States Congress. This is clearly relevant in showing that Union Oil Company believed that the state of the law was such that testimony should indicate a non-mandatory program.

Immediately following the House of Representatives Subcommittee No. 5 Report, the Federal Trade Commission filed cases against consignment agreement programs. These cases, *FTC* v. *Sun Oil Company* and *FTC* v. *Atlantic Refining Company*, were referred to by this Honorable Court in *Simpson* v. *Union Oil Company of California*, 311 F.2d 764, 769 (9th Cir. 1963). This series of events required the court to find that Union Oil could not reasonably have believed that the consignment agreement program as carried out was wholly lawful and did not violate the antitrust laws of the United States. Even if admonitory judicial precedent be ignored, to find Union's protestations of innocence "fully justified" flies in the very face of the Congressional recommendation that the Department of Justice investigate consignment agreement programs.

13. Finding of Fact Number 13

Finding of Fact Number 13 is in conflict with the Supreme Court decision in *Simpson*. It is respectfully submitted that the Supreme Court itself determined the state of the law as to price fixing by suppliers or their dealers. The Supreme Court decision in *Simpson* did not reverse or overrule *General Electric*; the Supreme Court stated, rather, that it would not

price fixing on non-patented articles.

The Simpson decision followed the line of cases rendering retail price maintenance agreements unlawful per se and preventing manufacturers from taking coercive steps to enforce their policies on those who would otherwise follow their independent judgment. These principles were well known to the business world. The holding of Simpson v. Union Oil Co. in the Supreme Court did not constitute a new rule that "vast" price-fixing consignment agreements, not limited to those coercively employed, can no longer be considered agancies under the antitrust laws, 377 U.S. at 21-22, was thought by the dissenter to represent a new departure and hence to inject severe uncertainty into commercial relations. This in turn could be answered by the doctrine of prospectivity. The majority may be presumed, in its last sentence, to have replied to Justice Stewart's predictions that noncoercive bona fide consignment systems fixing resale prices would come before the Court. Id., 25. The Court, however, necessarily distinguished any rule which would result from the Simpson decision in the future from the preexisting rules which governed the result in that case, in their considered rejection of the arguments of Justice Stewart and of appellee, who has ignored the Court's judicial finding of coercion in the institution and operation of Union's consignment program.

14. Finding of Fact Number 14

Finding of fact number [illegible] is beyond the powers of the Court and beyond the proper function of a court of equity. Union Oil Company determined to enforce its consignment agreement program despite investigations by the House of Representatives, the Department of Justice and this single Union Oil dealer who was unceremoniously turned out of his business. It evinced a fixed determination to maintain control over retail prices against all sources of antitrust enforcement. General Counsel of appellee did not examine the issue of coercion involved in its program.

The antitrust laws have always stood for the independence of the dealer to determine matters of price and products, free of the coercive requirements of suppliers. Union Oil cannot on the one hand create independent businessmen in its leasing arrangements and on the other control their judgments as to the most important aspect of their business, the retail price charged. Appellee carried out a price control program by which the dealer's retail prices were coerced by harassment and threats, as occurred against Simpson, and now expresses surprise that its conduct should be declared actionable. Equity cannot lend its hand to legalize a coercive actor's unlawful scheme and grant it immunity against the legal remedies of a person injured in his business and property.

Even if it were within the province of a court of equity to grant immunity in the Simpson case, a record showing coercive programs knowingly and actively conducted by Union Oil Company against the dealer's independent judgment would preclude relief. A history of investigation by the House of

with respect to appellee's price fixing activities gainsays guiltless ignorance. One who with such warnings enters into a program tying price fixing agreements to leases, policing those prices, and threatening the dealers with loss of their business cannot obtain relief from a court of equity. Fairness and the policy of the antitrust laws prevent such a result. The parties should be left to their legal relationship.

III. A VERDICT WITHIN THE RANGE OF ARGUMENT PERMITTED BY THE COURT AND SUPPORTED BY EVIDENCE PROPERLY ADMITTED IS A PROPER BASIS FOR JUDGMENT.

A. The Court Should Have Struck the Statements of Jurors Grigon, Smith and Price Impeaching the Verdict Before It Considered Defendant's Motion for a New Trial.

The appellee requested jurors to sign affidavits as to what occurred in the jury room concerning the jury's deliberations in reaching a verdict. Appellee then filed two affidavits and a declaration following its investigation. (Cr. 361-362) Ethical questions aside, this method of attacking a verdict is contrary to proper administration of justice and the trial court exceeded its discretion in not striking the solicited statements.

Consideration of the jury affidavits and declarations here is in conflict with the opinion in Northern Pacific Railway Company v. Mely, 219 F.2d 199 (9th Cir. 1954). In this

case the Ninth Circuit advised the Bar that it would be improper or unethical for attorneys to investigate jurors and file affidavits going into the manner in which the jurors arrived at their deliberations. This court specifically stated:

> " . . . We do hold for future guidance that it is improper and unethical for lawyers, court attaches or judges in a particular case to make public the transactions in the jury room or to interview jurors to discover what was the course of deliberation of a trial jury."
> 219 F.2d at 202.

Notwithstanding this guidance from the Ninth Circuit, the defendants filed affidavits and a declaration as to what occurred in the jury room and the court refused to strike them. (Cr. 361-362) These affidavits and declaration should not have been countenanced by the court, and it was prejudicial error to do so. See McDonald v. Pless, 238 U.S. 264 (1915); Smith-Blair, Inc. v. R.H. Baker & Co., 232 F. Supp. 484 (S.D. Cal. 1962), aff'd, 331 F.2d 506 (9th Cir. 1964); Fort Worth & Denver Ry. Co. v. Thompson, 216 F.2d 790, 793 (5th Cir. 1954); cf. Stein v. New York, 346 U.S. 156, 178-179 (1953)(distinguishing interrogatories from post-trial questioning); Galarza v. Union Bus Lines, Inc., 38 F.R.D. 401 (S.D. Tex. 1965). It is clearly the rule that a verdict will not be impeached by affidavits or declarations claimed to show the instructions were not followed, see E.L. Farmer & Co. v. Hooks, 239 F.2d 547, 553-555 (10th Cir. 1956), yet

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this is basically what the defendants sought (See Tr. 1663)
The Court should not have ruled with the affidavits before it.

B. The Trial Court Erred in Granting Defendant's Motion to Set Aside the Verdict and Granting a New Trial.

The defendant intended to destroy Simpson's business and did so. It was for the jury to determine a fair measure of the value of that business. Accordingly, it was presented with a valuation study prepared by Morton Paglin, Ph.D., Professor of Economics at Portland State College, Oregon, and teacher of economics, public finance, economic development and statistics. (Tr. 748-749) Dr. Paglin first valued Simpson's business in terms of Mr. Simpson's expected business life, estimated at 24 years, and based upon projections from Simpson's business records he determined the estimated net income which Simpson's business could have produced in these 24 years. It was the policy of appellee continually to renew leases. (Tr. 274-278)

Dr. Paglin first applied Mr. Simpson's actual 1956 gallonage to projected gasoline gallonage of 17,452 gallons, which was the three-month average of the service stations for June, July and August, 1957. This period was chosen because a first year of business is not represenative and because highway construction commenced in the vicinity of Simpson's station in November 1957. (Tr. 756-757, 763) Based upon the actual income and the actual average gallonage, Dr. Paglin valued Mr. Simpson's business at $97,398.

Secondly, Dr. Paglin projected the actual profits made by Mr. Simpson in this three-month period of $809.00 over the

24-year period. This projection resulted in a valuation of $147,895.00. (See Tr. 765) When Dr. Paglin made his original projections, he did not have the Union Oil Company's estimated gallonage of the service station involved. These records were subpoened at the trial, and that was the first time that plaintiff had access to the information. Defendant's records estimated the potential of the station to be 25,000 gallons per month. (Pl. Exs. 71 & 72) Based upon Union's estimate of gallonage of 25,000 gallons a month at the station, Dr. Paglin estimated that Simpson's income would be $13,200 income a year. (Tr. 769) Using the standard annuity tables, $13,200 income for a 24-year had a capitalized value of $211,970.80 at 3% interest and $201,260.40 at 4% interest.

The jury verdict is thus well within the range of lost values to Mr. Simpson for the destruction of his business intended by the defendant. The defendant destroyed Mr. Simpson's business, the potential of Mr. Simpson's business, and the fruit of his two years of efforts as the service station. 24 years of a man's business career has been trifled with by defendant,and a person has been subjected to coercion and threats contradictory to the meaning and purposes of the Sherman Act. The profit potential of the business which would have been available to Mr. Simpson but for defendant's violation of the antitrust laws has been properly valued by the jury and its decision should not be interfered with.

It is respectfully urged that the court's granting a new trial amounts to error, for the exercise of a trial court's

discretion on motion for new trial is not free of legal guidance. As this Court pointed out in *Liquid Veneer Corp. v. Smuckler*, 90 F.2d 196, 205 (9th Cir. 1937), "[t]he damages awarded is a matter for the jury [,] which is given wide discretion ... a verdict for plaintiff should not be set aside if it can be sustained from any viewpoint of approach." The use of the jury system in the federal courts requires that "reasonably disputable issues of fact . . . be resolved by the jury." *Peterman* v. *Indian Motorcycle Co.*, 216 F.2d 289, 292 (1st Cir. 1954). Once a case is properly submitted to that body, the losing party does not have a right to a second try, "even though the evidence submitted would have warranted the opposite verdict, and even though the trial judge, had he been sitting without a jury, might have found the facts the other way." *Id.*, 292-293. This is as applicable to the size of the verdict as to the direction in which it is cast. "Whether a judgment is high or low, it should stand if there is ample evidence to justify it. It is not the prerogative of the Court to arbitrarily substitute its judgment for that of the jury." *Mainelli* v. *Haberstroh*, 237 F. Supp. 190 (M.D. Pa. 1964). Thus the mere invocation of such words as "monstrous" does not justify the District Court's ruling where the amount of the verdict is sustained by the evidence.

Not only is the verdict within the evidence given to the jury and based upon the court's instructions, but the conduct of the jury was, according to all cognizable portions of the record, entirely proper. The judgment, however, states that "the verdict . . . is the result . . . of consideration

(Cr. 550) This cannot be supported. The court by its own satesment (Tr. 1803)(semble) did not give effect to the affidavits of jurors Price and Smith and the declaration of juror Grignon obtained ex parte by the movant below. This is thus no cognizable evidence of the jury's consideration of irrelevant factors. Yet the record at Cr. 550, supra, indicates that the court was unconsciously influenced by appellee's moving papers, which in turn reflected the fruits of unethical jury interviews. Thus appellee has caused error by placing improper affidavits before the court when it was to rule on Union's motion for a new trial. Appellee thereby succeeded in obtaining a result which it could not have hoped for had its counsel confined themselves to professional conduct.

It is respectfully urged therefore that the court enter a mandate which allows the entry of judgment based on the jury verdict.

CONCLUSION

Plaintiff has established that defendant has violated the Sherman Act to his damage in the sum of $160,000.00. The Supreme Court opinion does not sanction the result below.

Wherefore, appellant prays that this Court reverse the judgment below and direct that judgment be entered on the jury verdict.

DATED: ______________________

Respectfully submitted,

MAXWELL KEITH
R. CORBIN HOUCHINS

JAMES J. DURYEA
Attorneys for Appellant

by: ______________________
MAXWELL KEITH

[illegible]

[illegible]

[illegible]

[illegible]

his brief, I have examined Rules 18, 19 and 39 of the United tates Court of Appeals for the Ninth Circuit, and that, in y opinion, the foregoing brief is in full compliance with hose rules.

MAXWELL KEITH

AFFIDAVIT OF MAILING

STATE OF CALIFORNIA]
: ss.
CITY AND COUNTY OF SAN FRANCISCO]

VICTOR JACOBS, being duly sworn, deposes and says:

That he has caused to be served a copy of Appellant's Opening Brief in the above-entitled action by mailing a copy of the Appellant's Opening Brief to the following named attorneys for the Appellee in the said case at the address hereinafter set forth, postage paid, this 29th day of March, 1968.

Mr. Moses Lasky
Brobeck, Phleger & Harrison
111 Sutter Street
San Francisco, California

Attorney for Appellee

____
VICTOR JACOBS

Subscribed and sworn to before me
this ______ day of March, 1968.

____
Notary Public
In and for the City and County of
San Francisco, State of California

My Commission expires: __________

Plaintiff's Exhibits

Exhibit Number	Identified	Offered	Received	Rejected
1	258	258	258	
2	308	308	308	
3	316	316	316	
4	323	324	324	
5	342	342	342	
6	342	342	342	
7	369	370	370	
8	382	382	382	
9	386	386	387	
11	411	411	411	
12	413	416	417	
13	417	417	417	
14	417	417	417	
15	418	418	418	
16	420	420	420	
17	424	424	425	
18	427	427	427	
19	427	427	427	
20	428	428	428	
21	428	428	428	
22	429	429	429	
23	430	430	430	
24	431	431	431	
25	431	431	431	

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27	432	432	432	
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38	446	446	446	
39	447	447	447	
40	447	447	447	
41	447	447	447	
42	455	455	455	
43	455	455	455	
44	456	456	456	
45	456	456	456	
46	457	457	457	
47	457	457	457	
48	457	457	457	
49	481	481	481	
50	488	488	488	
51	496	496	496	

Exhibit Number	Identified	Offered	Received	Rejected
52	503	503	503	
53	580	580	580	
53-A	667	667	667	
53-B	667	667	667	
54	580	580	580	
55	619	619	619	
56	620	620	620	
57	625	625	625	
58	627	627	627	
59	629	629	629	
60	663	663	663	
61	667	667	667	
62	669	669	669	
63	675	675	675	
64	676	676	676	
65	677	677	677	
66-A	680	680	680	
66-B	680	680	680	
67	700	700	700	
68	770	770	770	
69	884	884	884	
70	906	905, 919		919
71	912	912	**	
72			**	
73	1216	1216	1216	
74	912	1255	1261	

Exhibit Number	Identified	Offered	Received	Rejected
75	1279			
76	1330	1335		1335
77	1331	1335		1335
78	1331	1335		1335
79	1346	1347		
80	1349	1365	1365	
81	*		***	
82			***	
83			***	
84			***	
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86	*			
87	*			
88	*			
89	*			
90	*			
91	*			
92	*			
93			***	

* Marked by clerk for identification only.

** Received into evidence on February 6, 1967.

*** Received into evidence on February 14, 1967.

Exhibit Number	Identified	Offered	Received	Rejected
A	514	515	515	
B	515	517	518	
C	519	782	783	
D		782	783	
E	787	787	788	
F	788	792	792	
G	831	832	833	
H	855	856	859	
I	866	868	870	
J	947	949	949	
K	961	969	970	
L	961	969	970	
M	970	971	972	
N	972	972	974	
O	1138	1138	1138	
P	1216	1216	1216	
R	1388	1388	1388	
S	1396	1396	1396	
T	1492	1492	1493	

No. 22148

In the

United States Court of Appeals

For the Ninth Circuit

RICHARD S. SIMPSON,

Appellant,

vs.

UNION OIL COMPANY OF CALIFORNIA,

Appellee.

Brief for Appellee

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SUBJECT INDEX

INDEX OF AUTHORITIES

Cases Pages

CONSTITUTION, STATUTES AND CODES

TREATISES, LAW REVIEWS AND MISCELLANEOUS

No. 22,148

In the

United States Court of Appeals

for the Ninth Circuit

RICHARD S. SIMPSON,
Appellant,
vs.
UNION OIL COMPANY OF CALIFORNIA,
Appellee.

Brief for Appellee

STATEMENT OF THE CASE

A. Proceedings Up to the Supreme Court's Decision

This case has been here before, *Simpson v. Union Oil Company of California,* 311 F.2d 764 (1963).

In 1958, the year this suit started, Simon N. Whitney, Chief Economist and Director of the Bureau of Economics of the Federal Trade Commission, noted that there were three different ways in which refiners or suppliers of gasoline marketed their product.[1] One was to sell directly at retail to the motoring public through

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The 20-volume transcript on the present appeal consists of two volumes of Clerk's Transcript and 18 of Reporter's Transcripts. We shall cite the Clerk's Transcript as "1 R. ...." or "2 R. ....", and the Reporter's Transcripts as "R. ....". We shall cite the printed record in this Court on the prior appeal, No. 17308 in this Court's files, as "First R. ....".

All emphasis in quotations in this brief has been added unless otherwise stated.

1. Simon N. Whitney, Antitrust Policies (Twentieth Century Fund, New York, 1958), Volume 1, p. 126.

wage-paid employees. Another was to sell directly at retail to the motoring public through consignees, that is, to sell through dealers engaged as commission-paid agents of the refiner. The third was to sell to retail dealers who resell to the public.

Appellee[2] is one of the many refiners and marketers of gasoline on the West Coast. Before 1955 its method of marketing its branded gasoline was Whitney's third method, sale to retailers for resale by them. In 1955 it adopted Whitney's second method, sale directly to the motorist through the agency of consignees.

For some years before 1956 appellant[3] had been one of Union's wage-paid employees, his last salaried position being that of a district representative to its dealers. As such, he was familiar with Union's consignment method of marketing and with the consignment agreement and was the employee through whom Union presented and explained it to each of the 32 Union dealers in the district.

In 1956 he craved to be a Union dealer at a Union station in Fresno, California. In May 1956 he leased the station from Union for a term of one year. In 1957 Union gave him a new one-year lease. Concurrently with the first lease, Simpson and Union executed a Retail Dealer Consignment Agreement ceasing by its terms on any termination of Simpson's right to occupy the station. In April 1958 Union notified Simpson that it would not offer him a further lease at the end of the lease year and that it was terminating the consignment agreement concurrently.

The day before his lease was to expire Simpson brought this action to enjoin Union from taking possession of its property and obtained a temporary restraining order. June 3, 1958, the court (Chief Judge Harris) denied an interlocutory injunction, *Simpson v. Union Oil Company,* 162 F.Supp. 746. Union then sued Simpson in a State court for unlawful detainer of the property and obtained a judgment, and Simpson surrendered possession.

He then amended the complaint in this action to seek damages, charging violation of the Sherman Act. The suit was an unusual

---

2. Hereafter sometimes called "Union".

3. Hereafter sometimes called "Simpson".

kind of antitrust case, for there was only one defendant, the case involved only the conduct of that one party, acting alone, and was neither a conspiracy case nor a monopoly case.[4] The gist of his contention was that the consignment agreement was illegal as a price-fixing agreement in restraint of trade. He claimed that Union refused to give him a new lease because of his refusal to honor the obligations of the consignment agreement to charge the prices Union directed him as its agent to charge for gasoline.

Union moved for summary judgment. Denying this motion in order to permit Simpson the opportunity to "throw more light upon the alleged claim" by further discovery and "without prejudice to its renewal at such time as more facts may become the predicate upon which a decision on the motion can be based", the court (the late Judge Edward Murphy), observed that the "plaintiff's case is extremely thin." (First R. 87-88) The court (Judge Burke) then took control of the litigation and initiated a series of pretrial conferences. As this Court observed in its opinion on the first appeal, "to say the least plaintiff's contentions vacillated" (311 F.2d 764, 767). After extensive pre-trial and discovery, Union again moved for summary judgment, and Simpson moved for partial summary judgment. At the urging of the District Court, to produce a sharp issue and to put an end to Simpson's incessant shifting of theories, Union stipulated that it was its policy to lease its stations only to consignees, and that it declined to give Simpson a new lease because he had violated the consignment agreement (First R. 409)[5] Union's motion was

4. At an early pre-trial conference (April 30, 1959) Simpson's counsel conceded that "This is not a conspiracy case. This is a case of the action and activities of a single defendant." At the next pre-trial conference (May 21, 1959) he repeated, "The complaint does not charge conspiracy" and that "Monopoly as such is out of the case" (First R. 369, 395-397).

5. We assumed that we were so stipulating for the purposes of our motion, but, subsequent to remand after the first appeal, we observed that our language was "for the purposes of this case". We therefore honored not only the intention but the inadvertent language of the stipulation, and the case was tried with that stipulation as a predicate. (R. 251-2, 262-272)

granted with an opinion, *Simpson* v. *Union Oil Company of California,* 1961 Trade Cas. ¶ 69,936, p. 77,693.

From the judgment of dismissal, Simpson appealed, and this Court affirmed, *Simpson* v. *Union Oil Company of California,* 311 F.2d 764.

B. The Supreme Court's Revolutionary Decision and the Striking Last Sentence of Its Opinion

The Supreme Court granted certiorari, reversed by a 5-3 division, *Simpson* v. *Union Oil Company of California,* 377 U.S. 13, and remanded the case for further proceedings. Its decision was revolutionary. Few decisions have been the subject of so much law review comment. What the Court did was to overrule its settled law that selling by consignment was simply selling through an agent and that it was not illegal price-fixing for a principal to establish the price at which his agent was to sell its goods, *United States v. General Electric Co.,* 272 U.S. 476 (1926).

The opinion of the Supreme Court concluded with this striking sentence that more than one court and writer has commented upon, namely:

> "We reserve the question whether, when all the facts are known, there may be any equities that would warrant only prospective application in damage suits of the rule governing price fixing by the 'consignment' device which we announce today." (377 U.S. at 24, 25)

That sentence underlines most of the case as presented to this Court on the present appeal.

C. The Proceedings Following the Supreme Court's Opinion

The Supreme Court's decision was rendered April 20, 1964. May 8, 1964, Union filed with the Supreme Court a Petition for Rehearing in which, *inter alia,* (p. 5) it quoted the concluding sentence of the Court's opinion and continued:

> "But this leaves unstated who is to determine the existence of the 'equities'. Is it to be the jury on a trial of this case?

> Or, since determination of equities is normally not within the province of juries, is it to be the trial judge? Or must the case return to this Court for determination of the equities? If it is to be returned to this Court, then we respectfully submit that the equities should be determined now unless their determination rests upon the facts not before the Court."

That petition for rehearing was denied without comment, *Simpson v. Union Oil Company,* 377 U. S. 949.

After the case returned to the District Court (1 R. 1-4), Union moved for a pre-trial conference (2R. 587-589),

> "to determine the mode and order of trial of the issue reserved by the Supreme Court of the United States, viz.: Whether the equities do not preclude retrospective application of the rule announced by that Court to this case."

At the hearing on this motion Union's counsel said (R. 7-9):

> "How do we go about in this case determining whether the equities preclude retroactive application of this new rule of law? Ordinarily, equities are determined by courts, not juries. In a petition for rehearing to the Supreme Court, I presented the question: Who is going to decide the equity issue you have left open?
>
> "The Supreme Court gave no enlightenment.
>
> * * * * * * *
>
> "I can conceive, theoretically, * * * of three possible ways in which this question of equity is to be determined.
>
> "First, I would assume that equities being questions for judges, not juries, it would be determined upon a hearing to be held before the court first. After the court had heard all of the evidence, it could then decide if in fact the equities did preclude recovery, and there would be no jury trial at all.
>
> "Or, still thinking of the theoretical possibilities, the whole thing would be tried before the jury and have the jury decide it, in which they hear not only the evidence that bears upon the legality, but also evidence that bears upon the equity of applying a new rule of law. This rather baffles me, that a jury would pass on this.

> "Or, the third possibility is that the whole issue be heard before the court and jury simultaneously, the evidence coming in all at once, the judge deciding at the close of the case whether the equities precluded letting it go to the jury or not."

Union's counsel stated that Union did not care which of these several procedures was to be followed, but that it should know before trial, in order to know when and at what time to offer "the evidence bearing upon the fairness and decency and equity of applying a new rule of law retroactively * * *" (R.9). Simpson's counsel retorted that the Supreme Court's opinion did not leave any such equity issue open in this case (R. 16-17 and 2 R. 41).

Two other pre-trial conferences were held on the subject with extensive briefing. In June 1966 the District Court made its "Pretrial Order" which reads, *inter alia,* (1 R. 123-124):

> "This action having been remanded to this Court by the Supreme Court of the United States for trial, and the Supreme Court's opinion stating that
>
> > 'We reserve the question whether, when all the facts are known, there may be any equities that would warrant only prospective application in damage suits of the rule governing price fixing by the "consignment" device which we announce today,' * * *
>
> "It is hereby ordered as follows:
>
> * * * * * * *
>
> "2. Included in the issues to be tried is the issue whether the equities warrant only prospective application of the rule announced by the Supreme Court in this case governing price fixing by the consignment device; specifically, in this case, where the facts occurred before the Supreme Court announced its rule, whether the equities preclude application of that rule. In that connection, upon the trial of the case, defendant shall be afforded an opportunity to present to the Court and to the jury evidence supportive of its claim that the equities do not warrant application in this case of the rule respecting consignment agreements announced by the Supreme Court."

On August 8, 1966, Simpson filed in the United States Supreme Court a "Motion for Leave to File Petition and Petition for Writ of Prohibition or Mandamus, or Both in the Alternative" (Supreme Court Misc. No. 553, October Term 1966), contending that the pre-trial order violated the Supreme Court's mandate and seeking to prohibit "the enforcement of the Pretrial Order" and to compel the District Court "to preclude defendant from asserting any 'equities' which would warrant prospective application of this Court's decision in 377 U. S. 13 in any other Court than" the Supreme Court. He further argued that in any event the equity issue was not to be tried by a jury. Union replied that it was indifferent whether the issue was to be tried by court or jury and that the pre-trial order merely specified that there was to be a single trial with all the evidence coming in before court and jury but leaving open to the trial judge the question whether the equity issue would be put to the jury or decided by the court. The Supreme Court denied Simpson's motion, *Simpson v. United States District Court,* 385 U. S. 806 (1966).

Thereafter the case was tried below before Judge Wollenberg and a jury in January and February, 1967. At the final pre-trial immediately before trial Simpson's counsel again took the position that the equity issue was for the court to try, not the jury, stating (R. 146):

> "I had urged at the pretrial stage of the case that this whole question of equities really ought to be decided, if at all, by the trial court, that it was not a jury question."

And again, (R. 174):

> "This other question is simply a matter of whether or not, assuming a verdict, there is going to be a judgment against the defendant, and that is for the Court to decide, not the jury. Now, of course the Court, in the exercise of its equity jurisdiction, can ask interrogatories of the jury. But certainly it's not going to let the jury determine whether or not it is going to enforce a judgment. That is simply up to the Court.
>
> We would urge, Your Honor, that these are well known principles. And there is certainly nothing in the Supreme Court opinion to indicate that the trial should proceed in any

> other way. Now, I think all they have in mind there, assuming the correctness of the pretrial order, is that they want all the facts, the whole record, before they determine the application of that decision.
>
> Now, that doesn't mean that the jury must decide all those facts. All they want is a full and complete record."

And again (R. 178):

> "If they come in with a verdict in favor of the plaintiff, then we have the question of whether the Court will enter that judgment."

At the close of the evidence, the District Court acceded to the view urged by Simpson; it held that the equity issue was not to be decided by the jury and reserved it for the court's own decision after return of a verdict (R. 1632-3). The jury was given the case to determine what damages, if any, plaintiff had sustained if Union had violated the law. The jury returned a verdict for Simpson for $160,000 (2 R. 297).

The court then held the equity issue for briefing and argument (R. 1670). Defendant filed a timely motion for judgment notwithstanding the verdict on the ground that there was no evidence to support a finding that Simpson suffered any damage. It also filed a motion for new trial (2 R. 301). Plaintiff filed a motion to enter judgment upon the verdict (2 R. 361). After full briefing and argument (R. 1675-1804), the court decided the equity issue for defendant (R. 1801-1803), denied plaintiff's motion for judgment and "defendant's motion for judgment on the issues submitted to the jury notwithstanding the verdict" (2 R. 550), but granted defendant's motion for new trial (R. 1803).[6]

The court made extensive "Findings and Conclusions of Law" on the equity issue (2 R. 540-547), which are reported in *Simpson*

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6. The court denied the motion for judgment notwithstanding the verdict because it was not "completely convinced that there is no such evidence if the cause of action lies here and if there is some proof of damage. I do think, however, that the amount of damage in the sum of $160,000 is not sustained by the evidence [and] is [un]conscionable." (R. 1803.)

v. Union Oil Company of California, 270 F.Supp. 754. By Finding 14 it found (2 R. 546):

> "On all the facts as they now have been made known by the trial of this case, it would be unfair and inequitable to apply to this damage action, wherein the operative facts all arose in the years 1956-1958, the rule respecting price-fixing by the consignment device announced on April 20, 1964 in *Simpson v. Union Oil Company of California,* 377 U. S. 13."

Its Conclusions 2 and 3 read (2 R. 546-547):

> "2. The belief of defendant prior to April 20, 1964 that the Retail Dealer Consignment Agreements between itself and retail gasoline dealers and the actions taken by it pursuant thereto were entirely lawful under the antitrust laws was reasonable and warranted by *United States v. General Electric Company,* 272 U. S. 476 and other authorities."
>
> "3. The equities warrant only prospective application to damage suits of the rule respecting price fixing by the consignment device announced on April 20, 1964 in *Simpson v. Union Oil Company of California,* 377 U. S. 13, and, particularly, do not warrant application of said rule to this case."

The court then entered its written Orders and Judgment (2 R. 548-550). The Judgment adjudicated (2 R. 550):

> "plaintiff's action herein against defendant is dismissed with prejudice".[7]

Its order with respect to a new trial was that

> "defendant's motion to set aside the verdict on said issues [the issues submitted to the jury] and to grant a new trial thereon should a further trial be necessary is hereby GRANTED."

In granting this new trial the court said that "there was more speculation, guess work and conjecture in making up the sum

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7. Appellant argues that this judgment is inconsistent with the order denying Union's motion for judgment notwithstanding the verdict (App.Op.Br. 16, para. numbered 6). The denial of the motion for judgment notwithstanding the verdict was expressly stated by the court to be a denial of judgment on the issues submitted to the jury (2 R. 550). The equity issue was not submitted to the jury.

of $160,000 than I have ever experienced with a jury * * *" (R. 1803).

From that judgment plaintiff has appealed (2 R. 558).

D. The Questions Presented by This Appeal.

Although appellant's brief (pp. 10-13) purports to state 8 questions and 8 specifications of error, these are proliferation of but two questions:

> *Question 1:* Did the District Court err in holding that the equities warranted only prospective application to damage suits of the rule respecting consignment announced on April 20, 1964 by the Supreme Court and did not warrant application to this case, and, on that basis, entering judgment for Union? Appellant's Questions 1, 2, 3, 4 and 5 and Specifications I, II, III, IV and V all relate to this.
>
> *Question 2.* Did the District Court err in granting a new trial, should its dismissal be held erroneous? Appellant's Questions 6 and 7 and Specifications VI and VII relate to this.

If this Court should affirm the District Court as to Question 1, as we submit it should, there will be no need to pass on Question 2. Nevertheless, we shall discuss both questions.

Pseudo-Question: In his Statement of the Case, appellant asserts that the District Court foreclosed certain issues (App. Op. Br. 8)[8], i.e., alleged issues of "attempt to monopolize" and "tieing sale of petroleum products to its leases". Although appellant's Question 8 (App. Op Br. 11) and Specification of Errors VIII (App. Op. Br. 13) purport to raise a question about this, the matter is nowhere discussed and is "deemed abandoned and need not be considered herein," *Peck v. Shell Oil Co.,* 142 F.2d 141, 143 (9 Cir. 1944), and cases there cited. We therefore relegate a brief discussion of the matter to an Appendix I to this brief.

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8. The designation "App. Op. Br." is used to refer to Appellant's Opening Brief.

Argument

I.

THE DISTRICT COURT CORRECTLY HELD, PURSUANT TO THE SUPREME COURT'S MANDATE, THAT THE NEW RULE ANNOUNCED BY THE SUPREME COURT ON THE FIRST APPEAL SHOULD NOT BE GIVEN RETROACTIVE APPLICATION SO AS TO APPLY TO THIS CASE.

A. Summary and Fundamentals About the Equity Issue.

The Supreme Court's opinion in *Simpson v. Union Oil Company of California,* 377 U. S. 13 (April 20, 1964) concluded with this statement (pp. 24-5):

> "We reserve the question whether, when all the facts are known, there may be any equities that would warrant only prospective application in damage suits of the rule governing price fixing by the 'consignment' device which we announce today."

From this simple declarative sentence and its context a number of significant matters are obvious.

1. That sentence was not a commonplace provision in judicial opinions. Its inclusion was calculated and deliberate.

2. What the Supreme Court declared to be the *rule* concerning consignments was a *new* rule, one which theretofore had no existence. It was a "rule * * * *which we announce today*", April 20, 1964.

3. The rule which the Supreme Court then announced was to govern business *thereafter.* It could be the basis of court injunctions or of Federal Trade Commission cease and desist orders. Obviously, too, the rule would apply *in criminal actions and damage suits arising out of facts which should occur after April 20, 1964.* But whether it should be applied *in damage suits* arising out of facts that occurred before that rule was announced was another matter entirely. The Supreme Court made it crystal clear that its pronouncement did not necessarily constitute a rule to govern the past.

4. The Supreme Court did not itself decide the equity issue but left it open to be decided "when all the facts are known." Since a trial is the mode in which the law ascertains facts, the Supreme Court's mandate necessarily included a direction to the District Court to ascertain the facts upon which the determination was to be made as to what rule of law was to be applied to the case. Appellant's argument that the Supreme Court merely reserved to itself the right to make that determination finds support in no known procedure. Referring to the very sentence in the Supreme Court's *Simpson* opinion with which we deal, *Lyons v. Westinghouse Electric Corporation,* 235 F.Supp. 526 (S.D.N.Y. 1964) said, "the lower federal courts have the obligation to reach their own conclusions on this question until such time as the Supreme Court decides it." (P. 536). No doubt the District Court's determination is reviewable by this Court under the usual standards of appellate review and later by the Supreme Court if it should then deem certiorari warranted. But the contention that the issue must somehow be left in Limbo unless and until the case should reach the Supreme Court is patently senseless. Appellant's contention that "the most the trial court should have done was to allow Union Oil Company to open the record for any taking of evidence that would aid or assist the Supreme Court in determining whether or not there were any equities in accordance with its opinion" (App. Op. Br. 37) would create an unheard of procedure. It would amount to the Supreme Court's appointing the District Court as Special Master to take evidence without findings or recommendation and without any procedure for reporting back.

5. The issue left open by the Supreme Court was not merely whether the rule it announced on April 20, 1964 is to be applied to *other* damage suits. It included the question whether the rule is to be applied in this very case. The statement, "We reserve the question", necessarily referred to a *question* in the case before the court; it was not purely a gratuitous reference to some question that might arise in some other case. In *Guidry v. Continental Oil Company,* 350 F.2d 342 (5 Cir. 1965), the court, speaking of the Supreme Court's decision in *Simpson,* said (p. 344):

> "However, the Court in Simpson reserved 'the question whether, when all the facts are known, there may be any equities that would warrant only prospective application in damages suits of the rule governing price fixing by the "consignment" device which we announce today.' This reservation seemingly *refers to the inequity to subjecting the Union Oil Company to a triple damage action for conduct that was apparently legal until the narrowing of United States v. General Elec. Co.,* 1926, 272 U. S. 476, 47 S.C. 192, 71 L.Ed. 362."

6. Equities relate to fairness. The question thus left open by the Supreme Court is this: "Is it fair to change the rules of the game after the game has been played?" Is it fair to mulct one in damages for acts innocent and justifiably believed to be legal when done and on that foundation to give Simpson a lifetime annuity on the factual basis that he chose to flout a contract into which he had knowingly entered with deceitful purpose to defraud Union?

7. The kind of *damage* suits that arise from antitrust laws are suits for *treble damages.* Treble damages are in the nature of criminal punishment. The Supreme Court in *Commissioner v. Glenshaw Glass Co.,* 348 U. S. 426 (1955) refers to the "punitive two-thirds portion of a treble damage antitrust recovery" (p. 427) and denominates it as "payments * * * extracted from the wrongdoers as punishment for unlawful conduct" (p. 431). In *Leh v. General Petroleum Corporation,* 330 F.2d 288, 298, 299, (9 Cir. 1964), reversed on other grounds, 382 U. S. 54 (1965), this Court said:

> "What is recovered under Section 7 of the Sherman Act (15 U.S.C. § 15 note) is no less a penalty on the wrongdoer than is the fine and imprisonment with which the sovereign can threaten the violator under Sections 1 and 2, or the forfeiture of articles transported in commerce, as provided for in Section 6. (15 U.S.C. § 6.)"

In *Mach-Tronics, Inc. v. Zirpoli,* 316 F.2d 820, 831-32 (9 Cir. 1963), this Court approved the statement of Judge Learned Hand

in *Lyons v. Westinghouse Electric Corp.*, 222 F.2d 184 (2 Cir. 1955), cert. den. 350 U. S. 825 (1955), (p. 189) that recovery in an antitrust action "inevitably presupposes a punitive purpose. It is like a *qui tam* action, except that plaintiff keeps all the penalty, instead of sharing it with the sovereign."

8. Moreover, what violates the Sherman Act for civil purposes is also a crime. This and the fact that the damages in this kind of case are akin to criminal punishment *evoke the abhorrence underlying the constitutional prohibition of ex post facto laws* (U. S. Const., Article I, Sec. 9, Cl. 3). [9] While that constitutional prohibition is probably not technically applicable, since it relates to legislation, the rationale of the prohibition of *ex post facto* laws is that justice abhors retroactive application of any rule. This is the basis of the principle that even civil statutes, whether substantive or procedural, are never construed as to have a retrospective application unless the contrary legislative intent clearly appears. *Aetna Casualty and Surety Co. v. I.A.C.*, 30 C.2d 388, 393, 182 P.2d 159 (Cal. Sup. Ct. 1947).

To say that something is abhorred by justice is to say that it is inequitable. The reason the antitrust laws provide for treble damage is to punish those who have flouted a public policy so fundamental. Implicit is the presence of a law-defying mind. The "principal purpose of treble damages seems to be punishment which will deter the violater and others from future illegal acts", *Commissioner v. Obear-Nester Glass Co.*, 217 F.2d 56, 61 (7 Cir. 1954), cert. den. 348 U. S. 982 (1955). But one whose actions are in conformity with the Sherman Act as it had been interpreted by the highest court in the land at the time those actions occur is not flouting the law, and he needs no such punishment to whip him into line.

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9. Every law which makes criminal an act which was innocent when done is an *ex post facto* law, even though given a civil form. *Burgess v. Salmon,* 97 U. S. 381 (1878); *Ex parte Garland,* 71 U. S. (4 Wall.) 333, 377 (1867).

B. Appellant's Constitutional Objections Are Frivolous. It Is Not Necessary That a New and Overruling Rule of Law Apply in the Case in Which It Is Announced. On the Contrary, Overruling Decisions Should Be Given Such Application Only in the Most Compelling Circumstances

Appellant seems to contend that every decision operates "retroactively" so as to apply to the case in which is was issued (App. Op. Br. 23-27). *This is an archaic motion, now rejected.* It stems from the old Blackstonian theory that courts do not make law and never change it, that the law has always existed fixed and immutable, and courts merely find and declare it. Under that theory, while a court may conclude that it had not theretofore correctly "found" the law and may therefore proceed to "declare it" differently, the law has always been exactly as the court last declares it. Under this archaic theory, the new rule applies to past events because it was always the law, hovering in the ambient blue, simply awaiting with patience its time to be discovered. But for quite some time it has been recognized that this theory is pure "myth", as it is characterized in *United States v. Fay,* 333 F.2d 12, 15 (2 Cir. 1964), aff'd *sub nom. Angelet v. Fay,* 381 U.S. 654 (1965). It is there noted that Justice Cardozo was one of early jurists to criticize the theory as wholly unrealistic (*U. S. v. Fay,* supra, at 16). Courts now frankly recognize that (a) they do make and change law—a fact nowhere more true than of the United States Supreme Court in the antitrust field; and (b) that it can be highly unfair and unjust to apply a new rule to events which had occurred before its pronouncement. Consequently courts do deny application of the new rule to the very case in which it is announced.

Appellant's constitutional argument that "separation of powers" and "due process" prevent a court from denying to a litigant rights that Congress has bestowed (App. Op. Br. 16, 23-28) is a naive expression of the archaic theory. Of course courts must apply constitutional laws of Congress, but it is the judicial function to determine and construe what Congress has enacted. When a long-standing judicial interpretation is such that a defendant

has not violated that law, and the highest court as later composed changes its mind, it has been held in certain contexts that it is unconstitutional to fasten the new interpretation on those who acted in reliance on the old. But only once has it been urged that the constitution requires the new rule to be applied, and then the Supreme Court rejected the argument as absurd. *Great Northern Ry. Co. v. Sunburst Oil Co.,* 287 U.S. 358 (1932). As said in *Linkletter* v. *Walker,* 381 U. S. 618, 629 (1965), "the Constitution neither prohibits nor requires retrospective effect." Moreover, no argument as to constitutionality was made below and therefore none is available now. *Williamson v. Weyerhaeuser Timber Co.,* 221 F.2d 5, 15 (9 Cir. 1955)

The question of whether or not to apply the new rule to facts theretofore occurring can arise in a variety of contexts, and the just treatment may vary with the context. For example, if in a criminal case what was formerly thought to be criminal is held not to be, retroactive application to the facts offends no sense of decency, for it means that a man truly innocent of violating law will not be punished. Or a court may pronounce a change in a rule as to the constitutionality of procedure in criminal cases. For example, if new constitutional protections are created, such as right to counsel, there is nothing unfair in applying the new rule to the pending case so as to grant the defendant a new trial; on the other hand it may not be wise, just or fair to apply that new rule to cases which had already gone to judgment. But if a new rule of statutory construction makes criminal what theretofore was not, particularly where the act thus illegalized is not one *malum in se* or inherently immoral but only *malum prohibitum,* as is true of so much economic regulation characteristic of the times, it would be shocking to apply the new rule retroactively:[10]

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10. See, *e.g., State v. O'Neil,* 147 Iowa 513, 126 N.W. 454 (Sup. Ct. Iowa 1910); *Commonwealth v. Trousdale,* 297 Ky. 724, 181 S.W.2d 254 (C.A. Ky. 1944); *State v. Koonce,* 89 N.J.Super. 169, 214 A.2d 428 (Superior Ct. N.J. 1965); *State v. Jones,* 44 N.M. 623, 107 P.2d 324 (Sup. Ct. N.M. 1940); *Laabs v. Wisconsin Tax Comm.,* 218 Wisc. 414, 261 N.W. 404 (Sup. Ct. Wisc. 1935).

In the area of *civil litigation,* the nature of the suit is also relevant. To *excuse* one from liability, by a changed interpretation of law in a situation where he would have been liable under a former rule, may be unfair *in a contract case,* since there the parties have relied on the former rule in making their contract. Thus over 100 years ago, in *Gelpcke v. City of Dubuque,* 68 U.S. (1 Wall.) 175 (1863), the Supreme Court held that, in a contract case, it is not constitutionally permissible for the highest court of a state to apply a changed rule to the case in which it was announced:

> "However we may regard the late case in Iowa as affecting the future, it can have no effect upon the past." (68 U.S. at 206)

And again:

> "The same principle applies where there is a change in judicial decision as to the constitutional power of the legislature to enact the law." *(Ibid.)*

The roots of *Gelpcke v. Dubuque* are further back in history. In *Rowan v. Runnels,* 46 U.S. (5 How.) 134 (1847), it was held that one who had contracted in Mississippi to buy slaves must pay for them despite change of construction of the Mississippi Constitution by the Supreme Court of that state holding that such contracts were illegal. Later, in *Ohio Life Insurance and Trust Co. v. Debolt,* 57 U.S. (16 How.) 415 (1853), following and extending *Rowan v. Runnels,* the Supreme Court said (p. 432):

> "Indeed, the duty imposed upon this court to enforce contracts honestly and legally made, would be vain and nugatory, if we were bound to follow *those changes in judicial decisions which the lapse of time, and the change in judicial officers, will often produce.* * * * And the sound and true rule is, that if the contract when made was valid by the laws of the State, as then expounded by all the departments of its government, and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent act of the legislature of the State, or decision of its courts, altering the construction of the law."

In *tort cases,* to *excuse* one from liability by a changed interpretation might be unjust to no one, if defendant's conduct was of the type that occurred without thought by anyone about the state of the law, as in negligence cases. But to *impose* liability for damages on a new interpretation of the law, for conduct theretofore held not to be tortious but wholly lawful, *is obviously unfair and unjust in the extreme.* Moreover, while liability for damages under the Sherman Act sounds in tort, in the present case the tort rests upon a *changed judicial view of the validity of a contract,* and thus the moral revulsion to retroactive and changed law is fully applicable.

In *Linkletter v. Walker,* 381 U. S. 618 (1965) the Supreme Court reviewed the "history and theory of the problem" of retroactive versus prospective application (p. 622). It returned to the problem in *Johnson v. New Jersey,* 384 U. S. 719 (1966). In *Linkletter* it said:

> "At common law there was no authority for the proposition that judicial decisions made law only for the future. Blackstone stated the rule that the duty of the court was not to 'pronounce a new law, but to maintain and expound the old one.' * * * [622]
>
> "On the other hand, Austin maintained that judges do in fact do something more than discover law * * *. [623]
>
> "The Blackstonian view ruled English jurisprudence and cast its shadow over our own * * *. However, some legal philosophers continued to insist that such a rule was out of tune with actuality largely because judicial repeal ofttime did 'work hardship to those who [had] trusted to its existence.' Cardozo, Address to the N. Y. Bar Assn., 55 Rep. N. Y. State Bar Assn. 263, 296-297 (1932). The Austinian view gained some acceptance over a hundred years ago * * *. And as early as 1863 this Court drew on the same concept in *Gelpcke v. Dubuque,* 1 Wall. 175 (1863)." (p. 624)

A line of cases, of which *Gelpcke* is one, seems to have held or intimated that decisions of the highest court of a jurisdiction, though later overruled are law nonetheless for intermediate transactions. In the landmark case of *Great Northern Ry. v. Sun-*

burst, 287 U. S. 358, 364 (1932) (per Cardozo, J.) the Court definitively settled that these intimations were too broad, that courts are not necessarily compelled to do so but may treat their overruled decisions as the law for activities which occurred while those decisions were outstanding "whenever injustice or hardship will thereby be averted." Since *Sunburst* there have been numerous law review articles on the subject. Chief Justice Traynor cited some in his 1960 decision in *Forster Shipbuilding Co. v. County of Los Angeles,* 54 C.2d 450, 458, 6 Cal. Rptr. 24, 28, 353 P.2d 736 (Cal. Sup. Ct. 1960), where he said:

> "In recent years much attention has been given to the problem of mitigating the hardships caused by an overruling of established law. [citations omitted.] Under traditional theory an overruled decision is considered not to have established bad law, but to have merely misstated the law. The overruling decision is deemed to state what the law was from the beginning, and is therefore generally given retroactive effect. * * * *In most jurisdictions, however, courts have established exceptions to the general rule of retroactivity to protect those who acted in reliance on the overruled decision.* * * * The Supreme Court of the United States has held that the United States Constitution does not compel retroactive application of overruling decisions. * * * State courts have * * * frequently stated that the decision whether to apply an overruling decision retroactively or prospectively only turns on considerations of fairness and public policy. * * *
>
> "We have hitherto recognized that the California Constitution permits an appellate court to apply an overruling decision prospectively only, even though it thereby temporarily preserves and applies a mistaken interpretation of the Constitution."

Since then there have been even more law review discussions. See, for example, "Prospective Overruling and Retroactive Application in the Federal Courts", 71 Yale Law Journal 907 (1962).

In *Re Lopez,* 62 C.2d 368, 42 Cal. Rptr. 188, 398 P.2d 380 (1965), the Supreme Court of California observed that

"Some recent judicial opinions have maintained that it is 'generally undersirable to give retroactive effect to overruling decisions, except in the most compelling circumstances' " (p. 379)

and also said (p. 372) that new interpretations

"should be applied retroactively *only* in those situations in which such new rules protect the innocent defendant. . . ."

In *Linkletter v. Walker*, 381 U. S. 618, 628 the Court concluded:

"Thus, the accepted rule today is that in appropriate cases the Court may in the interest of justice make the rule prospective."

And by "prospective" is plainly meant cases whose facts arise after the time the decision is rendered. "It was the judgment of this Court that changed the rule and *the date of that opinion* is the crucial date" (381 U. S. at 639). Thus in *Johnson v. New Jersey*, 384 U. S. 719 (1966) the Supreme Court said (p.732):

"All of the reasons set forth above for making *Escobedo* and *Miranda* nonretroactive suggest that these decisions should apply only to trials begun after the decisions were announced."

In *Mosser v. Darrow*, 341 U. S. 267, 276 (1951), Justice Black had said, some years ago, that when the Court announced a new rule creating heavy liabilities in civil cases, it should apply the rule only prospectively.

In the course of this developing law, as courts groped for a correct view and moved away from the mythical Blackstonian theory, an occasional state court took the curious course of applying the rule retroactively to the case in hand, while making it prospective for all other cases. In major part this was due to the remaining hold of the old Blackstonian myth that a court could declare law only by applying it in the case in which it spoke. That notion, of course, is now dead. As said in *State v. Martin*, 62 Wash. 2d 645, 384 P.2d 833 (Sup. Ct. Wash. 1963):

> "We note that the doctrine [of prospective overruling] had not yet attained full vigor but was still geared to the concept that the overruling in futuro was in some way connected with the idea that it was more a prophecy of what the law would be in the future, than a declaration of a rule of law. Not so the doctrine today. We no longer need measure the niceties of stare decisis which heretofore have characterized adherence to precedent. * * *
>
> "Experience and reason have combined to cut away the strictures binding the doctrine to the declaratory theory, and, thus liberated, it is now revealed to us as a true component of stare decisis." (384 P.2d at 847)

Moreover, cases where the new rule has been applied to the case at bar but otherwise not retroactively are almost all cases of changed interpretation of constitution or statute for the better protection of a defendant in a criminal or sanity hearing.[11] Of appellant's citations only *Molitor v. Kaneland Community Unit District No. 302,* 18 Ill. 2d 11, 163 N. E. 2d 89 (Sup. Ct. Ill. 1959), was a damage suit, and that was a case overruling the doctrine of sovereign immunity from suit. Whatever may be thought of the merits of that decision,[12] it is not remotely relevant.

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11. Such is *Dooling v. Overholser,* 243 F.2d 825 (D.C. Cir. 1957) cited by appellant.

12. In *Molitor v. Kaneland* the suggestion was made that plaintiff should be singled out for preferred treatment as a "reward". A less rational disposition and a less defensible one in a damage case would be hard to imagine, certainly outside the "immunity" defense. If a "reward" is to be given a plaintiff, it cannot be taken from a defendant who would not be liable to anyone else on like facts and where on like facts no other party would be liable. To hold otherwise would bring the Constitution into play. It would be unconstitutional as violative of the equal protection principle now established as part of the Fifth Amendment to the United States Constitution emanating from our "American ideal of fairness". *Bolling v. Sharpe,* 347 U. S. 497, 499 (1954). In "Tom Molitor and the Divine Right of Kings", 37 Chicago-Kent Law Review 44, 51, the absurdity of the reasoning was exposed, as it was by Professor Keeton of Harvard Law School in "Creative Continuity in the Law of Torts", 75 Har. Law Rev. 463 (1962), at 490, 491. The idea of applying an overruling decision to the case at bar while denying retroactivity to all other cases "produces distinctions perhaps more difficult to justify than either wholly prospective or wholly retrospective overruling"; if rewards are to be given,

In immunity cases the acts of the defendants have always been tortious and regarded as so, but recovery had been barred by the notion that the King could not be sued in his own court. Since the power of courts to limit an overruling decision to the future has come to be fully recognized, courts rendering an overruling decision in respect of business law, such as tax impositions and the like, and applying it prospectively only, deny application to the case in which the new rule is announced. See the comprehensive discussion in *State v. Martin,* 62 Wash. 2d 645, 384 P.2d 833 (Sup. Ct. Wash. 1963). Also *Southern Pacific Co. v. Cochise County,* 93 Ariz. 395, 377 P.2d 770 (1963); *Mutual Life Insurance Co. v. Bryant,* 296 Ky. 815, 177 S.W. 2d 588 (C.A. Ky. 1943); *American-First Title & Trust Company v. Ewing,* 403 P.2d 488 (Sup. Ct. Okla. 1965); *Continental Supply Co. v. Abell,* 95 Mont. 148, 24 P.2d 133 (Sup. Ct. Mont. 1933); *Hare v. General Contract Purchase Corp.,* 249 S.W. 2d 973 (Sup. Ct. Ark. 1952).

In *State v. Martin,* supra, the court said:

> "Prospective overruling imparts that final degree of resilience, to the otherwise rigid concepts of stare decisis, so necessary to prevent the system from becoming brittle. It enables the law under stare decisis to grow and change to meet the ever-changing needs of an ever-changing society and yet, at once, to preserve the very society which gives it shape." (384 P.2d at 849)

Warring v. Colpoys, 122 F.2d 642 (D.C. Cir. 1941), cert. den. 314 U. S. 678 (1941) (cited in App. Op. Br., p. 35), is a case where the court *declined* to apply the changed rule announced in *Nye v. United States,* 313 U. S. 33 (1941) to a past situation.[12a]

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they should come from public funds (Keeton at 491). In *Spanel v. Mounds View School District,* 264 Minn. 279, 118 N.W.2d 795 (Sup. Ct. Minn. 1962) and *Williams v. City of Detroit,* 364 Mich. 231, 111 N.W. 2d 1 (Sup. Ct. Mich. 1961) where the doctrine of immunity for governmental agencies was overruled prospectively, plaintiff's action was dismissed.

12a. *Nye v. United States,* 313 U. S. 33 (1941) merely applied a new rule to the case at bar without stating anything about retroactive application at all; it was a criminal case.

The opinion was written by Justice Vinson, later Chief Justice of the United States Supreme Court, and is all the more remarkable in that it was written a quarter of a century ago. We quote (pp. 645-7):

> "*When a case is decided it is expected that people will make their behavior conform to the rule it lays down and also to the principle expressed in so far as it can be determined.* This is true whether the decision is regarded as 'the law', 'the best evidence of the law', or 'a prediction of what the court will do next time.' * * * Those transactions *which occurred between the two decisions are, for the most part, accepted history.* * * * There has arisen, for example, when contract rights or property rights growing out of contracts are involved, the exception that the one who argued against the established law is not given the benefit of the change he helped bring about inasmuch as his adversary relied upon the previous law. Such decisions apply the old law to the case at hand while establishing new law for the future. * * *
>
> "All of the loose ends presented in this discussion on the effect of altering the law can be pretty well tied together when it is realized that law is not a pure science, that law loses its vital meaning if it is not correlated to the organic society in which it lives, that law is a present and prospective force, *that law needs some stability of administration,* * * * *that people will rely upon and adjust their behavior in accordance with all the law* be it legislative or judicial or both.
>
> "These considerations should guide the lawmakers and the lawappliers in making their determinations in respect of whether a change in the law is to be effective only for the future or also for the past, and if the latter, to what extent. And these considerations should be applicable to both sides of a potential litigation, civil or criminal, *so that we may have our rules of the game as we go.*"

It is in this setting of realistic law that the Supreme Court wrote its sentence in Simpson v. Union Oil Company, viz.:

> "We reserve the question whether, when all the facts are known, there may be any equities that would warrant only prospective application in damage suits of the rule governing price fixing by the 'consignment' device which we announce today." (377 U. S. at 24-5.)

Appellant seeks to escape the inevitable conclusion by arguing that the Court did not use the term "purely prospective" (App. Op. Br. 34), pointing to use of that phrase in *Linkletter v. Walker,* 381 U. S. 618 (1965). *Linkletter* was decided one year after *Simpson,* and in *Simpson* the term was "*only* prospective". Certainly "only" and "purely" are synonymous.

Of all courts the Supreme Court is the court whose efforts, of necessity, are least directed to the rights *inter se* of the parties in the immediate case. Its position at the apex of the judicial system, the sheer physical limitations on human capacity and time, the exercise of its certiorari jurisdiction, all compel it to direct its attention to establishing the principles of law to be followed by all in the future, leaving it largely to the lower tribunals to apply those principles in particular cases. It is obvious that what induced the Supreme Court to bring up the *Simpson* case for its attention was not any concern whether a particular man named Simpson should recover damages from a particular company named Union Oil, but a desire to rule on consignment merchandising in the economy of the United States. From the nature of things the Court can make its pronouncements only in cases that come before it, *but it realized full well that, in the course of pronouncing rules of conduct for the future,* application of its new pronouncement to treble damage suits arising from past facts could be unjust.

The decision in the *Simpson* case was by 5 to 3 division. Justices Brennan and Goldberg (hardly conservatives) dissented, saying:

> "Since the decision may be expected to affect consignment agreements in many businesses, *including outstanding agreements that may have been entered into in reliance upon United States v. General Electric, 272 U. S. 476, the Court ought not pronounce that judgment.* * * * We therefore agree with Mr. Justice Stewart * * *." (377 U. S. at 31-2.)

Mr. Justice Stewart, dissenting, said:

> "It is clear, therefore, that the Court today overrules *General Electric.* * * * I should have thought that a decision of such impact and magnitude could properly be reached only after careful consideration of all relevant considerations and

> preferably by a full Court. *Today's upsetting decision carries with it the most severe consequences to a large sector of the private economy. We cannot be blind to the fact that commercial arrangements throughout our economy are shaped in reliance upon this Court's decisions elaborating the reach of the antitrust laws. Everyone knows that consignment selling is a widely used method of distribution all over the country. By our decision today outlawing consignment selling if it includes a price limitation, we inject severe uncertainty into commercial relationships established in reliance upon a decision of this Court explicitly validating this method of distribution.* We create, as well, the distinct possibility that an untold number of sellers of goods will be subjected to liability in treble damage suits because they thought they could rely on the validity of this Court's decisions." (377 U.S. at 29-30.)

It would be a surmise close to the bull's-eye that the critical sentence at the close of Justice Douglas' opinion was a material factor in making it the opinion of the Court.

No constitutional right to a jury trial was denied appellant.

Part of appellant's constitutional arguments revolves about some claim of denial of jury trial (App. Op. Br. 28-30) which we find obscure. The simple answer is that it is for the court and not the jury to determine what rule of law applies to the case before them; a court does not deny one his jury trial by taking a verdict subject to the court's applying the proper rule. The *determination whether the rule announced by the Supreme Court on April 20, 1964 was or was not to be applied retroactively to operative facts occurring earlier was a judicial task of determining the applicable rule of law.* Moreover, so far as that determination rested on an ascertainment of facts, it was part of determining an equity, which is never a jury function. How absurd and impossible it would have been for a jury to determine the state of the law prior to April 20, 1964, and the reasonableness of reliance on the *General Electric* rule! There are many instances in jurisprudence where, in a jury trial, a ruling of the court must turn on some factual determination which it is the function of the court, not the jury, to make. For

example, court, not jury, determines whether a proffered confession was voluntary before the confession may be admitted, *Jackson v. Denno,* 378 U.S. 368 (1964). Court, not jury, determines whether proffered evidence would be incriminating when the privilege against self-incrimination is raised, just as court, not jury, determines a variety of other disputed foundation questions (Uniform Evidence Code (Cal.), §§ 404, 405).

It was so obvious that the issue was for court, not jury, that from the very beginning appellant himself continually so urged, as we showed in our Statement of the Case, at pp. 7 to 8, supra. When the District Court finally acquiesced in appellant's contention on this score, appellant did not object (p. 8, supra). When the court instructed the jury that this question was not for them, he did not object as required by F. R. Civ. P., Rule 51 if a claim of error was to be preserved.

We cannot tell from appellant's obscure argument whether he now claims that the issue should have been given the jury. But, if he does and if he ever had a right to have the issue go to the jury, which we deny, plainly he waived it. Moreover, no claim of constitutional right was raised below, and so none is available now. *Williamson v. Weyerhaeuser Timber Co.,* 221 F.2d 5, 15 (9 Cir. 1955); *Cox v. City of Freeman,* 321 F.2d 887, 891 (8 Cir. 1963).

C. It Is Unfair to Apply the New Rule of April 20, 1964 to the Present Case, a Treble Damage Suit Based on Facts Arising in 1956-1958

If the jury verdict were permitted to ripen into a judgment, it would be trebled to $480,000 with an attorney's fee added. Some part of the $480,000 would be subject to income tax.[13] This tax

13. A review of federal income tax treatment of recoveries in antitrust litigation appears in Antitrust and Trade Regulation Report, No. 339, Jan. 1968, pp. B-1 et seq. The two-thirds resulting from trebling may be taxable, *Commissioner v. Glenshaw Glass Co.,* 348 U.S. 426 (1955), but the single "damages" of $160,000 would not be, to the extent that it represents injury to "good will" or loss of a "business". *Raytheon Production Corp. v. Commissioner,* 144 F.2d 110 (1 Cir. 1944), cert. den. 323 U. S. 779 (1944).

would in essence be a payment by Union to the government as punishment for doing what was plainly lawful under the law as all understood it to be when the acts were done. Then, what Simpson would keep, invested at 5%, would produce an income of from $10,000 to $20,000 per year *for the rest of Simpson's lifetime and still leave the principal intact.* This amounts to an annual income from 2 to 4 times as much as Simpson ever earned in any year.[14] *And he would get this windfall for life and leave this large estate, all without the necessity of ever again lifting a finger to a moment's toil.*

An inquiry into equity or principles of fairness must ask what facts can support these bizarre results. The facts are easily summarized. Back in 1956 Union owned the leasehold on a service station in which it had invested large sums of money in order to have an outlet for its gasoline. As we have said, and shall further demonstrate, until April 20, 1964, Union's consignment method of merchandising was absolutely legal under the principles of *United States v. General Electric,* 272 U. S. 476 (1926). Relying on the *General Electric* doctrine, Union proceeded to market its gasoline by consignment, a wholly legitimate procedure at that time. As an employee of Union, Simpson had helped put the consignment system into effect. With his eyes open he acquired possession of Union's service station by solemnly agreeing to sell gasoline as its agent. He then dishonored his word. Because his word was worthless, Union refused to give him further possession when his lease terminated. *Yet, for loss of that further possession, although under California law he had been given only two 1 year leases,* the verdict would give him a fantastic income and estate, because 6 to 8 years after the facts of the case the Supreme Court denounced consignment as illegal. Nor is that the whole of it. It is pertinent to inquire, as we shall do (pp. 52-54 infra), into the morals of the manner in which Simpson managed to insinuate himself into that very possession which he would now parlay into this enormous recovery.

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14. As shown in Part II below.

1. UNION'S RELIANCE ON THE GENERAL ELECTRIC DOCTRINE.

At pages 12, 13, supra, we quoted from *Guidry v. Continental Oil Co.,* 350 F.2d 342 (5 Cir. 1965), a statement that the Supreme Court's reservation "until all the facts are known" referred to *the inequity of subjecting Union to a treble damage action for conduct apparently legal until April 20, 1964.*

Lyons v. Westinghouse Electric Corporation, 235 F.Supp. 526 (S.D.N.Y. 1964) is equally specific. That case involved a consignment set-up for electric lamps similar to General Electric's consignment system. The case was tried at the end of 1963 (p. 529) before the Supreme Court's *Simpson* decision and decided in 1964 after that decision. After holding that *Simpson* overruled the *General Electric* case, the court said (pp. 535, 536):

> "If the new doctrine of Union Oil governs this case, it would seem to follow that the Westinghouse-Ledco agency contract violated the Sherman Act.
>
> * * * * * * *
>
> "The question remains, however, as to whether the Union Oil doctrine should be applied retroactively in this case to invalidate agreements which were legal when made and which were made in obvious reliance upon a decision of the Supreme Court which upheld, in favor of these very defendants, agreements substantially similar to the very agreements here involved. The Court in Union Oil expressly left open the question of retroactivity saying (377 U. S. at 24-25, 84 S.Ct. at 1058-1059):
>
> > 'We reserve the question whether, when all the facts are known, there may be any equities that would warrant only prospective application in damage suits of the rule governing price fixing by the "consignment" device which we announce today.'
>
> "The phrase 'when all the facts are known' suggests that after further proceedings in the trial court, the Supreme Court may eventually decide that it will not apply the new doctrine to the Union Oil Company in that particular case, but will limit itself to announcing that the new rule will henceforth govern future cases. State courts have followed this approach, and when they do, their action does not violate the Constitution. Great Northern Railway Co. v. Sun-

burst Oil & Refining Co., 287 U. S. 358, 53 S.Ct. 145, 77 L.Ed. 360 (1932).

> "* * * *the lower federal courts have the obligation to reach their own conclusions on this question until such time as the Supreme Court decides it.*"

The court quoted the Supreme Court's statement in *Gelpcke v. City of Dubuque,* 68 U. S. (1 Wall.) 175 (1863), which we discussed above (p. 17),

> "that its decision 'rests upon the plainest principles of justice. To hold otherwise would be as unjust as to hold that rights acquired under a statute may be lost by its repeal.' (68 U. S. 175 at 206). Although we are here concerned with an overruling decision of the Supreme Court itself, rather than of a state court, the principle which governed in Gelpcke would appear to be equally applicable here."

The important factors in determining whether a new rule should be applied prospectively only are (a) reliance on the old rule and (b) the purpose sought to be served by replacing the old rule by a new one.

The court in *Lyons v. Westinghouse,* supra, cited *United States v. Fay,* 333 F.2d 12 (2d Cir. 1964), aff'd *sub nom. Angelet v. Fay,* 381 U. S. 654 (1965), also discussed by us above (where the court declined to give retroactive effect to *Mapp v. Ohio*) and said:

> "In so doing, the court laid down certain propositions which are apposite in the present case. In the first place, the court expressly rejected the Blackstonian theory that a court 'discovers' law, and that the rule set forth in an overruling decision always was the law, which unfortunately the same court in the overruled case had not properly discovered. In the second place, the court said that it is 'generally undesirable to give retroactive effect to overruling decisions, *except under the most compelling circumstances.*' (333 F.2d 12 at 21). *There are no such compelling circumstances here. On the contrary, the circumstances seem to me to compel the conclusion that the doctrine of Union Oil should not retroactively govern this case. If we are to look at the purpose of the Union Oil doctrine, that purpose would appear to be to prohibit price fixing by means of an agency or consignment contract, to the end that competition shall*

be free from this restraint. It could be said that it does not necessarily further the accomplishment of this purpose to impose a liability for treble damages upon one who made such a contract many years ago. The price fixing in such a case is of historical importance only. Its effect on competition is long since past. Competition in electric lamps in 1951 cannot be revived by awarding damages to these plaintiffs in 1964.

"Be that as it may, *it is the element of reliance* by defendants upon the former rule that is to me most compelling. *Here we have an agency system which was expressly upheld by the Supreme Court in General Electric and later by Judge Forman as well.* There can be no doubt whatever that Westinghouse relied on these decisions in continuing that system in effect.

"* * * Westinghouse's business has been left for over thirty years to develop on the understanding that its agency system was not subject to existing antitrust legislation. Although in the present case, unlike the baseball case, the Supreme Court has not followed the principle of stare decisis, but rather *has overruled its earlier decision in General Electric,* at least the fact of reliance should prevent the retroactive application of the overruling doctrine. To hold Westinghouse liable now for damages for making and carrying out a contract which was perfectly legal at the time that it was made and carried out, would be manifestly unjust. It is hard to conceive of a case in which there could be stronger 'equities' in defendants' favor. For these reasons I hold that the rule announced in Union Oil does not govern the Westinghouse agency contracts with which we are here concerned, and that for the purposes of this case, those contracts, under the rule of General Electric, do not contravene either the Sherman Act or the Clayton Act." (pp. 536, 537)

Obviously everything said about Westinghouse applies equally well to Union Oil Company itself. In *United States v. Fay,* the court said (p. 17) that

"Basic to the application [retroactively or prospectively only] * * * is the ascertainment of the reasons behind the decision",

and since the principal reason of the rule of *Mapp. v. Ohio* was to deter "police misconduct" by removing the incentive to violate the Constitution, it concluded (p. 19) that "this purpose is sufficiently, if not completely, served by refusing to apply the rule to searches and seizures long prior to the decision in *Mapp. v. Ohio* or the occurrences involved in that case." In *Lyons v. Westinghouse* the court emphasized the same idea, that in determining whether a new rule should be given retroactively, one must look at the purpose of the rule. And, since, as it said, the "purpose of the Union Oil doctrine" "would appear to be to prohibit price fixing by means of an agency or consignment contract," it did not "further the accomplishment of this purpose to impose liability for treble damages upon one who made such a contract many years ago." It is equally true that it does not further the accomplishment of the purpose to impose liability for damages on Union Oil Company for conduct occurring in 1956-1958.

In *Linkletter v. Walker,* 381 U.S. 618, 629, it was said:

> "Once the premise is accepted that we are neither required to apply, nor prohibited from applying, a decision retrospectively, we must then weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation."

In *Armstrong v. Motorola, Inc.,* 374 F.2d 764, (7 Cir. 1967), cert. den. 389 U. S. 830 (1967), the defendant in a patent infringement case raised the defense of misuse of the patent, because the patentee had included in a patent license a restriction on the classes of customers to whom his manufacturing licensees might sell the patented product. In including that clause the patentee had relied on the doctrine of *General Talking Pictures Corp. v. Western Electric Co.,* 305 U. S. 124 (1938). Defendant argued that the doctrine of *General Talking Pictures* was no longer good law, and that such restrictions violated the antitrust law under a line of subsequent cases. The Seventh Circuit was not convinced that *General Talking Pictures* was no longer good law,

but it rejected the defense even if *General Talking Pictures* were no longer in effect. It said that the defense of misuse of patent was but an application of the unclean hands doctrine of *equity,* and it pointed out that the licenses were granted at a time when the *General Talking Pictures* doctrine was clearly good law. Said it, "Armstrong [patent owner] was certainly not guilty of any unclean hands by relying upon the then patent law in formulating his licenses." (p. 774) The analogy to the present case is close, for each involves the inequity of punishing one for conduct performed in reliance on the law then in effect under the current Supreme Court decisions.

In *State v. O'Neil,* 147 Iowa 513, 126 N.W. 454, 456 (Sup. Ct. Iowa 1910), the court remarked:

> "Respect for law, which is the most cogent force in prompting orderly conduct in a civilized community, is weakened, if men are punished for acts which according to the general consensus of opinion they were justified in believing to be morally right and in accordance with law."

In *Warring v. Colpoys,* 122 F.2d 642, cert. den., 314 U. S. 678 (1941), from which we quoted extensively, supra, Justice Vinson concluded with these words:

> "It has often been said that the living should not be governed by the dead, for that would be to close our eyes to the changing conditions which time imposes. *It seems even sounder to say that the living should not be governed by their posterity, for that, in turn, would be downright chaotic."* (647)

Further on the importance of the fact of reliance.

In *Johnson v. New Jersey,* 384 U. S. 719 (1966) the Supreme Court emphasized that element of reliance on the old rule. Denying retroactivity to *Escobedo* and *Miranda,* it said (p. 731):

> "Law enforcement agencies fairly relied on these prior cases, now no longer binding, in obtaining incriminating statements during the intervening years preceding *Escobedo* and *Miranda."*

In *England v. Louisiana State Board of Medical Examiners,* 375 U. S. 411 (1964), plaintiffs challenged the constitutionality of a Louisiana statute. The District Court, under the abstention doctrine, refused to consider the claim until a state court ruled on whether the statute applied to plaintiffs at all. In the state court plaintiffs raised their constitutional objections as well as state law claims, believing that *Government Employees v. Windsor,* 353 U. S. 364, required them to do so. Upon returning to the District Court, plaintiffs' claim was dismissed on the ground that the state court had adjudicated all issues. On appeal from the dismissal the Supreme Court limited the *Windsor* decision. *The opinion was written just three months before the Supreme Court's Simpson decision and uses the same phrase about the "rule we announce today."* Said it (p. 422):

> "On the record in the instant case, *the rule we announce today would call for affirmance of the District Court's judgment [of dismissal]. But we are unwilling to apply the rule against these appellants.* As we have noted, their primary reason for litigating their federal claims in the state courts was assertedly a view that *Windsor* required them to do so. *That view* was mistaken and *will not avail other litigants who rely upon it after today's decision.* But we cannot say, in the face of the support given the view by respectable authorities, including the court below, that appellants were unreasonable in holding it or acting upon it. We therefore hold that the District Court should not have dismissed their action."

James v. United States, 366 U. S. 213 (1961), overruled the holding in *Commissioner v. Wilcox,* 327 U. S. 404, that embezzled funds are not taxable as income. But the Court refused to apply the holding of the *James* case to James himself and reversed a conviction for income tax evasion because of his "reliance" upon *Wilcox* (p. 221).

Proof of reliance.

Most courts require *no proof* of reliance, for it is presumed that one *does* rely on the law as it had been announced at the time

of the conduct. See, for example, the quotation at p. 23 above from *Warring v. Colpoys,* 122 F.2d 642 (D. C. Cir. 1941), cert. den. 314 U. S. 678 (1941). In *State v. O'Neil,* the court said (126 N.W. 454 at 457):

> "* * * The defendant may be presumed to have acted with knowledge of the fact that the statute now invoked as rendering illegal an act not otherwise wrongful or immoral had been expressly held by this court in cases prosecuted under public authority to be unconstitutional because in excess of legislative power."

And in *Continental Supply Co. v. Abell,* 95 Montana 148, 24 P.2d 133, 140 (Sup. Ct. Mont. 1933) the court said:

> "It is unnecessary that it be shown that reliance was actually placed by defendants upon the former decisions. Reliance thereon will be presumed."

While proof may have been unnecessary, the evidence below was explicit that Union did rely on the *General Electric* doctrine. The District Court so found. Its Findings Nos. 2, 3, 4, 11 and 12 (2 R. 542-546) are as follows:

> "2. Before adopting said system or putting it into effect the defendant consulted its General Counsel, an attorney at law duly admitted to practice and practicing law in the State of California since 1927, with respect to any legal questions that might be involved, and defendant was advised by its General Counsel that there were no legal objections and that the proposed arrangement and consignment agreements were entirely lawful both under the antitrust laws and all other laws. General Counsel studied, among other things, the then state of the antitrust law, particularly including the opinion and decision of the United States Supreme Court in *United States v. General Electric,* 272 U. S. 476, and decisions following that decision, was entirely satisfied that under that decision and the state of the law consignment and the proposed method of merchandising were lawful in every respect and would not violate the antitrust law.
>
> "3. The form and substance of the consignment agreement devised and thereafter used by defendant were modeled upon and were substantially the same as the consignment

agreement and arrangment of the General Electric Company which had been upheld in said *United States v. General Electric Co., supra,* and like the consignment agreement and arrangement used by *General Electric Co.* and involved in that case was true and *bona fide.*

"4. Acting in reliance on the legal advice of its General Counsel, defendant thereafter entered into thousands of consignment agreements with retail gasoline dealers, including the consignment agreement with plaintiff hereafter referred to.

*   *   *   *   *   *   *

11. In 1954 and at all times thereafter until the Supreme Court's decision in this case on April 20, 1964, it was the general and uniform view that the decision in said *United States v. General Electric Co.* was the law, that the rule of that case applied to all kinds of merchandise, and was not confined to patented articles. In relying upon that uniform and general understanding of the law, defendant's General Counsel and in turn the defendant acted reasonably and justifiably.

"12. Defendant at all times prior to the decision of the Supreme Court on April 20, 1964 reasonably believed that the consignment agreements between itself and retail gasoline dealers and the actions taken by defendant pursuant thereto were wholly lawful and did not violate the antitrust laws of the United States and defendant was fully justified in that belief.

Those findings were fully supported by the evidence. Mr. L. A. Gibbons, Union's Vice President and General Counsel, its chief legal officer with final decision for the company on legal matters (R. 1140) testified as follows (R. 1137-1201, 1292-1387): In 1954 union's vice president in charge of marketing informed Mr. Gibbons that he proposed to consign gasoline to the retail dealers and asked whether there were any legal objections to such a program. Mr. Gibbons was familiar with the law, for he had previously considered the legality of consignment in connection with Union's wholesale distributors. He knew, too, that other oil companies consigned. He advised that there were no objec-

tions but that he would "double check" and talk to the marketing vice-president again. He then went to the law library, re-examined and studied the *General Electric* case and other cases, with which he was "quite familiar", examined the California Civil Code sections on factors, viz., California Civil Code §§ 2026, 2027, was satisfied that *General Electric* was "clearly the law" and advised the marketing vice-president that "It was very clear to me there was absolutely no legal objection, antitrust-wise or otherwise" (R. 1143). Union then modeled its consignment on General Electric's (R. 1198).

A note on the *Simpson* decision in 18 Vanderbilt Law Review 222 (1964), refers to the "purpose for Union Oil's adoption of the consignment system of distribution" and said that purpose would have been a "persuasive" reason which "might have influenced the Court had it been advanced" (p. 228):

> "Under the conventional method of distribution in the petroleum industry, the retail gasoline dealer's extremely low profit margin usually resulted in his folding up under the pressures of the all too frequent price wars unless his supplier agreed to share the loss by granting a temporary price allowance. * * * In such cases the supplier was faced with the dilemma of sacrificing his own profit margin or loosing [sic] an outlet. * * * By adoption of the consignment system of distribution the supplier could avoid the necessity of facing this dilemma in three ways. First, by removing the burden of financing a gasoline inventory the supplier could improve the retailer's profit margin. Second, by agreeing in advance on how losses would be shared the supplier could avoid the necessity of a hasty decision. Third, by use of price controls the supplier could practice preventive medicine against price wars. Congress has expressly disapproved of price wars and similar unfair methods of competition. Federal Trade Commission Act, 38 Stat. 71 (1914), 15 U.S.C. §§ 41-44 (1958); Miller Tydings Act, 50 Stat. 693 (1937), 15 U.S.C. § 1 (1958); McGuire Act, 66 Stat. 632 (1953), 15 U.S.C. § 45 (1958)."

Prior to the Supreme Court's decision Union had no opportunity in this case to put in evidence of its purpose, inasmuch as it had

obtained a summary judgment in its favor. In fact, Union's purposes were those described in the Vanderbilt Law Review article, and Union had so told the District Court by a written statement in the *West Coast Oil* case in 1958.[15] Mr. Gibbons testified as to what Union was trying to accomplish. Of course consignment enabled Union, so it thought, to determine the price of its product. But control of price was a *means* to certain goals and *not* the *goals* (R. 1188-89). Mr. Gibbons' testimony on the subject (R. 1145-1147) and the *West Coast Oil* case statement can be summed up as follows:

There must be a continual flow of oil products from the refinery to the consumer. To that end Union had invested in numerous retail outlets. In order to be able to give competition to the other major refiners, it was necessary to have service stations that gave (1) good and prompt service (2) at competitive prices. Each of the several ways in which gasoline can be merchandised through such service stations (see pp. 1, 2 above) has advantages and disadvantages, to the public, to the dealer, and to the oil company. The method of operating stations through the company's own wage-paid employees, as Standard of California does, thereby validly fixing the price at which its gasoline is sold to the public, has two major disadvantages, (1) lack of incentive to the employee who runs the station to go out and get business, and (2) a shifting of employees from place to place as they are promoted through the organization; thus the dealer lacks roots in the community. These two disadvantages can be avoided by selling gasoline to retail dealers who buy it and resell. But this method has its own disadvantages. Essentially speaking, there are two classes of dealers. One is the kind who tries to gouge the public by overcharging it, thereby injuring the public, Union, and the dealer himself. The overcharging dealer loses gallonage, and this defeats the very purpose for which Union invested in the station in the first place, to move its product. Moreover, it is at the service station level that Union Oil comes face to face with the public. To the public the station *is* Union, and if the station

15. A certified copy is in evidence here as D. Ex. T, R. 1688.

overcharges, Union's reputation and standing suffer. The second type of dealer is the price-cutter, who charges too little. He not only ends up unable to give the public the kind of high grade service that Union wishes to be associated with its name, but he fails to earn a proper return. In the case of the widely deplored price wars he starts, it becomes necessary for the oil company to come to the rescue of the service station dealer with forms of dealer aid.[16]

Union wished to find a method of operation that struck a balance between the several advantages and the disadvantages. It felt that consignment would do it. Thereby Union could legitimately control the price of *its* gasoline, so it believed, just as Standard Oil still does with its wage-paid employees, but the correlative of this power was the acceptance of *"price responsibility"* to the public and the dealer. And thereby the dealer was relieved of the burden of carrying an inventory and was guaranteed his commission.

In this connection we may recall that Judge James Carter, in the *West Coast Oil* case, *United States v. Standard Oil, etc., et al.,* 1958 Trade Cas. ¶ 69,212, p. 74,760, noted that 1200 of Union's consignees owned their own stations or had them under lease from others than Union but nevertheless chose to be its consignees, saying:

> "The factoring set up may provide a security for these dealers which they find more desirable than the rough and tumble of operating their own business."

Union felt that consignment was a good and legitimate way of doing business, whereby the public was protected, the dealer was protected, and the company itself was protected. The Supreme Court later held that it could not continue to consign. But the legitimacy and honesty of its purpose remain unsullied. And the District Court has so found.

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16. Mr. Gibbons could have added at this point that granting dealer aid can pose difficult Robinson-Patman questions. See *Federal Trade Commission v. Sun Oil Co.,* 371 U. S. 505 (1963).

Answer to appellant's criticism of the finding of reliance.

Appellant seems to make two attacks on the finding of reliance. The first is that Mr. Gibbons did not give consideration to certain decisions. But none of those decisions is relevant or was thought to be relevant at the time, by anyone, as we show later in this brief.

Appellant's next criticism is the obscure one that Mr. Gibbons left matters to "marketing" (App. Op. Br. 21, 40, 44). Obviously, General Counsel is not the marketing department, but the marketing department relied on his advice. If we can glean any intelligence from the argument, it seems to be that, while Union had a right to assume that consignment was legal, it had no right to expect its consignees to live up to their agreements! **If** a consignment agreement whereby the consignee is required to follow the consignor's price directions *is legal,* **as the General Electric case held,** it would necessarily follow that the consignor is entitled to enforce the agreement. It also necessarily follows that if the consignee violates the agreement, the consignor is entitled to refuse to deal with the consignee further. One party to a contract is entitled to say to the other, "I will not give you a further lease of my property because you are a man whose word is worthless, a man who will not honor his contracts." It is only by first holding that a consignment agreement is illegal that it can ever be held that refusal to deal further with the defaulting consignee is improper.

Other criticisms by appellant of Mr. Gibbons' reliance involve notions about "coercion" which we discuss at length at pp. 54-61 infra.

2. UNION'S RELIANCE ON THE GENERAL ELECTRIC RULE AS THE LAW WAS ENTIRELY REASONABLE. THE SUPREME COURT DECISION WAS A REVOLUTIONARY ONE CREATING A NEW RULE OF LAW WHICH MADE ILLEGAL WHAT THERETOFORE HAD BEEN LEGAL.

As already quoted, the District Court found, not only that Union had relied on the *General Electric* decision, but that that reliance was reasonable. It further found (Finding 13, 2 R. 546):

"The rule announced by the Supreme Court in *Simpson v. Union Oil Company of California* on April 20, 1964, was a new rule that changed the law on the subject as it was theretofore generally understood to be."

These findings are plainly correct. They rest on a judicial analysis.

The Supreme Court's decision was so revolutionary that it has evoked a large body of law review comment. Even those who approve the sociology of the decision refer to it as a revolutionary change in the law and are puzzled by its reasoning.

The history of the General Electric rule and its unquestioned acceptance as continuing law.

1911: As long ago as *Dr. Miles Medical Co. v. John D. Park & Sons Co.,* 220 U.S. 373 (1911), Mr. Justice Holmes outlined the method later perfected by *General Electric* and said:

"If . . . [the manufacturer] should make the retail dealers also agents in law as well as in name and retain title until the goods left their hands . . . [it could not be denied] that the owner was acting within his rights." (p. 411)

General Electric followed this language closely in drafting its contracts.

1926: In *United States v. General Electric Co.,* 272 U.S. 476 (1926), it was definitively settled that consignment is not illegal under the antitrust laws as a price-fixing arrangement for the simple and obvious reason that the "distinction in law and fact between an agency and a sale is clear" and the antitrust laws do not prohibit one from determining the price at which he sells his own property. That proposition seemed elementary, and until the April 20, 1964 decision in *Simpson,* no court doubted or questioned it.

1941: In *Texas Co. v. Higgins,* 118 F.2d 636 (2 Cir. 1941), Judge Learned Hand, another outstanding jurist, considered the proposition as obvious and true.

1949: Just 5 years before Union decided to adopt consignment, the Supreme Court in *Standard Oil Co. v. United States,*

337 U.S. 293 (1949), which involved Standard of California's practice of selling to dealers under total requirements contracts, observed that, before Standard had adopted that method of marketing, its method was to sell through service stations under agency agreements and that, if Standard's later method were declared invalid, it would probably either return to the agency arrangement or make further use of the method of operating stations by wage-paid employees. Yet the court recognized that either of these arrangements would be legal (pp. 296, 298, 310). For that very reason Mr. Justice Douglas dissented from the outlawry of the total requirements contracts because he felt that the outlawry would lead Standard to bypass sales to the middleman entirely by adopting what he felt was the sociologically less desirable system of selling directly to the motorist through its own employees or consignees, *either of which would be legal* (p. 320). These opinions, majority and dissent, *plainly told the oil industry* that *General Electric* was still good law and was not questioned.

In the same year, 1949, Judge Forman in the *Mazda* case, *United States v. General Electric Co.,* 82 F.Supp. 753 (D.N.J. 1949) held that General Electric's consignment method of distribution was as *valid* then as in 1926.

1951: Two years later, in *United States v. Richfield Oil Corporation,* 99 F.Supp. 280 (S.D. Cal. 1951), aff'd per curiam, 343 U.S. 922 (1952), a case involving another aspect of requirements contracts, Judge Yankwich recognized the legality of consignment when he commented that in the case before him,

> "The operator pays for his gasoline and petroleum products *sold* to him by Richfield. *They are not merely consigned to him.*"[17] (p. 289)

1952: In *Boston Medical Supply Co. v. Lea & Febiger,* 195 F.2d 853, 856, the First Circuit held that consignees are "agents

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17. Simpson's counsel in the present case has repeatedly cited this decision as somehow supporting him when in fact it does the very reverse. (App. Op. Br., pp. 1, 20, 47, 50, 51).

under the substantive provision of the antitrust laws," that while "sales contracts stipulating the price at which the buyer must resell violate the Sherman Act * * * it is permissible for a manufacturer to make a retailer his del credere agent, sending goods to the agent on consignment to be sold at fixed price. *United States v. General Electric Co.,* 1926, 272 U.S. 476 * * *."

1953: In the *Mazda* case, *United States v. General Electric Co.,* 115 F.Supp. 835 (D. N.J.) Judge Forman entered a final decree on his decision of 1949, reasserting the continued vitality of the *General Electric* rule, and the government did not appeal. In the same year in *Westinghouse Electric Corp. v. Lyons,* 125 N.Y.S. 2d 420 (Sup. Ct. N.Y. 1953), it was held that consignment arrangements were not illegal under the antitrust laws on the authority of the *General Electric* case.

1954: In *Avon Products v. Berson,* 206 Misc. Rep. 900, 135 N.Y.S. 2d 867, 874, (Sup. Ct. N.Y. 1954) it was held on the authority of the *General Electric* case that "a manufacturer may control *original* sales of his product through agents; it is only when he restricts its *resale* by others that 'restraint of trade' comes into play." (Italics in original.)

1955-1956: Union adopted and put consignment into effect. In 1956 *Westinghouse Electric Corp. v. Lyons* was affirmed in 149 N.Y.S. 2d 212, 1 App. Div. 2d 770.

1958: Judge James Carter in the *West Coast Oil* case, which had been pending from 1950, announced that even should he eventually find that the defendants, including Union, had *conspired* to fix prices, he would not order discontinuance of consignment. *United States v. Standard Oil Co. of California,* 1958 Trade Cas. ¶ 69,212 (S.D. Cal. 1958).

1959: A consent decree[18] was entered in the *West Coast Oil* case, reported in *United States v. Standard Oil Company of California, et al.,* 1959 Trade Cas. ¶ 69,399. In that case the Government had *never* contended that it was illegal for any oil company to use consignment (although, on the theory of a horizontal con-

18. A certified copy is in evidence as Def. Ex. P.

spiracy it sought at one time to prevent the defendants from selling gasoline whether through wage-paid employees, consignees or even to independent dealers). The consent decree recognized the legality of Union's consignment system, as we show below.

1963: As late as 1963 the District Court of Appeal in California held in *Shasta Douglas Oil Co. v. Work,* 212 C.A.2d 618, 28 Cal. Rptr. 190 (D.C.A. 3rd Dist. 1963) (where the Supreme Court of California denied a hearing) that "it is lawful for a consignor selling through a consignee to fix the price at which he authorizes the consignee to sell the goods of the consignor." The court cited the *General Electric* case. One of the cases cited in the *Shasta Douglas* opinion is *Gonzales v. Derrington,* 10 Cal. Rptr. 700, 717 (1961), modified on other grounds, 56 C.2d 130, 14 Cal. Rptr. 1 (Sup. Ct. Cal. 1961), which involved the nature of Union's consignment arrangement and held that Union's consignees were merely its agents.

1963: The National Conference of Commissioners on Uniform State Laws issued its First Tentative Draft of a Proposed Uniform State Antitrust Act prepared for it by the Legislative Research Center, The University of Michigan Law School, which, it stated, basically followed the federal antitrust laws. The proposition that selling through consignees who are required to follow the consignor's price direction is outside the antitrust laws was thought to be so elementary that this draft, in the comment under the definition (Section 1(2)) of "contract, combination, or conspiracy", stated that "Consignment transactions have not been included; a principal is at liberty to control the price and other terms upon which his agent may dispose of his commodities or services." (See the current 4 C.C.H. Trade Regulation Reporter ¶ 30,101.)

The consent decree in the West Coast Oil case.

Appellant quibbled below about the fact that the consent decree in the *West Coast Oil Case* assumed the legality of Union's consignment system, and he will doubtless do so in his reply brief. But *impartial observers have had no doubt whatever about*

it. For example, Mr. Justice Stewart said in *Simpson v. Union Oil Company,* 377 U.S. 13 at 30, fn. 4, said:

> "The Department's [of Justice] views are not known, because they have not been sought. Indeed, had they been sought, there is a substantial possibility *in light of the Department's recognition and tacit validation of consignment selling under the 1959 consent decree entered against the large West Coast Oil companies, United States v. Standard Oil of California,* 1959 Trade Cases ¶ 69,399, p. 75,522, *et. seq.,* that the Government would have taken the position that the rule of *General Electric* should be left undisturbed."

While this appears in a dissenting opinion, it is a statement *of fact* which the opinion of the Court did not deny. Furthermore, in view of appellant's reference to the House Small Business Committee (see p. 67 infra), we note that, in 1964, after the Supreme Court's decision, Mr. Gregg Potvin, counsel for the Subcommittee on Distribution of the House Small Business Committee, in a speech to the Antitrust Section of the American Bar Association, said:

> "The Simpson case raises many questions. *For example, consignment is expressly recognized as the legitimate means of distribution of gasoline in the Consent Decree entered in the West Coast Oil Case."* (26 A.B.A. Antitrust Section 99, 105 (1964).)

Professor Rahl of Northwestern University Law School, in "The Demise of Vertical Price Fixing Through Consignment Arrangements: The Simpson Case", 29 A.B.A. Antitrust Section 216, 219 (1965), observed

> "The Government itself did not appear in the *Simpson* case, or file an *amicus* brief. Possibly it was reluctant to make an appearance on the matter after having agreed to a consignment price control system in a 1959 consent decree [referring to the *West Coast Oil* case]."

A certified copy of the Consent Decree in the *West Coast Oil* case is in evidence here as Def. Exhibit P. It was analyzed in Union's brief in this Court on the first appeal, in No. 17,308 (at

pp. 20-22). Its significance is that it confirms the reasonableness of Union's belief in the legality of consignment and its reliance on the *General Electric* doctrine, for Government counsel had the same belief or publicly acted as if they did.[19] It is inconceivable that otherwise, after conducting litigation for 9 years to clean up alleged evils in the oil industry, the Antitrust Division would have tolerated consignment for a single moment by provisions in the Consent Decree. Those provisions *were not simply negative, they were affirmative.* The Decree ordered Union to give a supply agreement to every lessee dealer and provided that Union would discharge that obligation by giving a consignment agreement under which it fixed the dealer's prices.

Moreover, no one reading the letter written by government counsel, Mr. Haddock, to Union's counsel on June 12, 1959, before Union agreed to the Consent Decree (part of Def. Ex. Q) can possibly read it as doing anything but recognizing the legitimacy of Union's consignment arrangement. That letter contains the following statements:

> "I have your letter of June 11 in which you ask the Antitrust Division to inform you in writing that the first clause of ¶ XI * * * should not be deemed to limit the right of defendant consignor to determine the price at which its consigned products shall be sold by a consignee.
>
> "I call to your attention * * * the definitions * * *. One of the purposes of this definition of a reseller was to make certain that Section XI would refer only to resellers and not

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19. Appellant argued below that the Consent Decree was not *res judicata* as to Simpson. We do not contend that it is, although in *K-91, Inc. v. Gershwin Publishing Corp.*, 372 F.2d 1 (9 Cir. 1967), this Court refers to "a very perplexing problem long existing in federal antitrust law, to wit, the extent to which relief, if any, should be granted against a business for conduct which is permissible under the terms of a judicially approved consent decree". (p. 3)

We do not even claim that the Consent Decree was *res judicata* against the Government, because it provided that it should not estop the government from suing in the future to enjoin any unilateral act of any defendant in retail marketing (Par. XV (B)). That clause was a general one, not aimed at consignment, but unquestionably its effect was to prevent the Decree from so operating as to preclude the Government from attacking consignment if it ever saw fit to do so. *But it never saw fit to do so.*

to consignee dealers. In view of these facts I have difficulty in understanding why you feel that it is necessary for plaintiff to advise you in writing that the term 'reseller' means reseller as defined in the proposed decree."[20]

The discussion in case and commentary about the Supreme Court's Simpson decision recognizes that it created a revolutionary new rule.

Everybody but appellant recognizes that the Supreme Court's decision in the *Simpson* case was revolutionary and left the bench, bar and business thunderstruck; that it either overruled the *General Electric* case completely and totally, as Justice Stewart said, or else limited it so narrowly as to destroy it by purporting to confine it to patented articles.[21]

Thus in *Lyons v. Westinghouse Electric Corporation,* 235 F.Supp. 526 (S.D.N.Y. 1964), which held it to be unfair to apply the *Simpson* doctrine to consignments where the facts had occurred before the *Simpson* decision, the court also made these statements:

"They [plaintiffs] claim that even though the contract between Westinghouse and Ledco created a bona fide agency, nevertheless the contract violated the antitrust laws. In other words, they say that the principal may not legally set the price at which his agent sells.

"At the time this case was tried, *United States v. General Electric Company, supra, afforded a complete answer* to this contention. But since this case was tried, the Supreme Court

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20. Appellant below pointed to P. Ex. 74 as some sort of contrary evidence. That exhibit is a letter Simpson's counsel *stated* was written to him by Mr. Haddock nearly two years after the present suit was filed. It refers to, and discusses, only a second and formal letter written by Mr. Haddock on June 19, 1959, not Mr. Haddock's letter of June 12, 1959. And it does no more than to say that the Government did not estop itself by the Consent Decree from assailing consignment should it see fit to do so.

21. No commentator has seen any merit in that distinction, and some predict that it will not survive long. For example, in footnote 20 in *Sun Oil Co. v. Federal Trade Commission,* 350 F.2d 624 (7 Cir.), cert. den. 382 U. S. 982 (1966) the court comments that Justice Douglas' view that the existence of a patented product constituted the "ratio decidendi" of *General Electric* has been severely criticized, citing other cases and articles (p. 635). But whether the distinction survives or not, it was a new rule.

has decided *Simpson v. Union Oil Co.,* 377 U. S. 13, 84 S.Ct. 1051, 12 L.Ed.2d 98 (1964)." (p. 534)

The court then describes Simpson as announcing *"a broad and novel principle"* (p. 535) and proceeds:

"Does Union Oil overrule United States v. General Electric, supra, *at least for the future?* Although the Court in Union Oil pointed out in a footnote (377 U. S. at 23, n. 10, 84 S.Ct. 1051) certain factual differences between the two cases, *these seem comparatively minor, and I do not understand the Court to say that it considered them sufficient to create any real distinction.* The Court said plainly that the General Electric case would be limited to its special facts, and that the fact which was significant in General Electric was the existence of General Electric's patents. * * *

"Whether this amounts to overruling General Electric or merely limiting it *is a matter of semantics.* The practical effect is the same, whichever word one uses. *I cannot escape the conclusion that where no controlling patents are present, the rule laid down in General Electric, at least for the future, is no longer law."*

In *Sun Oil Company v. Federal Trade Commission,* 350 F.2d 624, 635 (7 Cir. 1965), cert. den. 382 U.S. 982 (1966), this appears:

"While we have followed the Commission in holding the decision in the General Electric case distinguishable from that now before us on the basis that we are here concerned with horizontal as well as vertical price control, *additional support for this position—not then available to the Commission—is now available to us by virtue of the recent decision in Simpson v. Union Oil Company of California,* 377 U. S. 13, 84 S.Ct. 1051 (1964). *In Simpson, the Court apparently for the first time, sustained a direct attack on the 'exception' to per se illegality of vertical price control theretofore thought to have been carved out by General Electric.* Rather than overruling General Electric expressly, however, Mr. Justice Douglas, speaking for a majority of five, chose to limit it to its special facts, emphasizing that the consignment considered in that case covered a patented product. Thus limited, it is

now undoubtedly the law that, with regard to unpatented products, no such 'exception' exists."

In *C.B.S. Business Equipment Corp. v. Underwood Corporation,* 240 F.Supp. 413, 424 (S.D.N.Y. 1964) the court remarked:

"But while GE may still be persuasive in determining whether an agency relationship exists under particular circumstances, it would not appear to be authority for the validity of such agency contracts under the Sherman Act except possibly in the case of patented articles.

"In *Simpson v. Union Oil Co.,* 377 U.S. 13, 84 S.Ct. 1051, 12 L.Ed.2d 98 (1964), *the Supreme Court has given validity to the argument, rejected in GE,* that 'the system of distribution is so complicated and involves such a very large number of agents, distributed throughout the entire country, that the very size and comprehensiveness of the scheme brings it within the Anti-Trust Law.' United States v General Elec. Co., 272 U. S. at 485, 47 St.Ct. at 195.

"Does the fact that the product which is distributed is a patented article, with the patent held by the distributor, alter the situation? GE said that it did not make any difference (272 U.S. at 488, 47 S.Ct. at 196), although Mr. Justice Douglas in Union Oil, believed this fact to be the *ratio decidenti* of GE distinguishing it from Union Oil (377 U. S. at 24, 84 S.Ct. at 1058). However, a patent does not give the patentee any exemption from the provisions of the Sherman Act beyond the limits of the patent monopoly. [citations omitted] Although Mr. Justice Douglas referred to the 'consignments' in Union Oil in quotes, *I do not read his opinion as a determination that a true agency in legal definition did not exist between Union Oil and its consignees,* but rather that if such agency offends the anti-trust laws it will not be accorded the status it might otherwise receive."

In footnote 2 of this *C.B.S.* decision, the Court refers to Professor Handler's article, "Recent Antitrust Developments—1964," 63 Mich. L. Rev. 59 (1964), as "an excellent analysis and discussion of the Union Oil case". Professor Handler's article stated:

"In the *General Electric* case, however, Mr. Chief Justice Taft, for a unanimous Court * * * upheld the consignor's

right to set the price at which the consigned goods might be sold to the ultimate consumer. This result was reached despite the fact that the consignor had established the resale price, had possessed great economic power, had offered its dealers no alternative distribution arrangement, and had encompassed within a vast nationwide consignment network as many as four hundred wholesalers and 21 thousand or more retailers, all of whom were independent businessmen. And, the Court went out of its way to make clear that its ruling applied to unpatented as well as patented goods. * * * no one has ever doubted that a manufacturer may control the price charged by his consignees when there is a bona fide agency.

"*No doubt was expressed, that is, until early spring of this year* when Mr. Justice Douglas in *Simpson v. Union Oil* not only questioned, but appears to have denied, the right of a consignor to set the price at which his goods are sold by his duly appointed agents. Rather than overruling *General Electric* expressly, however, Mr. Justice Douglas chose to limit it to its special facts, emphasizing that the consignment considered in that case covered a patented product, a distinction correctly termed 'specious' by Mr. Justice Stewart in dissent. [pp. 59, 60]

* * * * * * *

"There is a puzzling schizophrenic quality to the Court's opinion in *Simpson.* * * * No comprehensible principle is articulated that would divide the sheep from the goats. The result is quite baffling, and one can only speculate as to what is the decisive element that tips the scale. [pp. 62, 63]

* * * * * * *

"One thing is clear. The Court does not invalidate the consignment arrangement because of any horizontal price-fixing conspiracy, as it did in *Masonite* or as the Federal Trade Commission ruled in *Sun Oil.* Nor does Mr. Justice Douglas purport to outlaw the consignment system, as in the Commission's decision in the *Atlantic Refining* case, on the ground that it was used only 'at irregular intervals and in certain markets during price wars' and was not the regular method by which the company sold its products. Quite to the contrary, Union's program had been in effect for close to a decade and was its regular method of doing business." (p. 64)

Professor Day, of Ohio State University, in "Developments in Antitrust During the Past Year", 25 A.B.A. Antitrust Section 3, 32 (1964), refers to the *Simpson* decision and its rejection of the *General Electric* case as *"a portentous move"*, a description that could only be applied to a new and revolutionary rule of law.

Professor Rahl of Northwestern University Law School, in "The Demise of Vertical Price-Fixing Through Consignment Arrangements: The Simpson Case", 29 A.B.A. Antitrust Section 216 (1965) and "Control of an Agent's Prices: The Simpson Case—A Study in Antitrust Analysis", 61 Northwestern University Law Review 1 (1966), referred to the *Simpson* decision as "the demise of the General Electric Doctrine".

A comment in 2 Tulsa Law Review 55 (1965) states:

> "Businessmen have been under the assumption that the case of the *United States v. General Electric* clearly set out the federal antitrust policy and explained the law dealing with consignments. * * *
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> *　　*　　*　　*　　*　　*　　*
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> "* * * This opinion leaves many who have justifiably entered into similar agreements in reliance on *General Electric* in a state of confusion * * * [p. 57]
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> *　　*　　*　　*　　*　　*　　*
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> "* * * As it now appears, there is no longer a criteria for determining which agreements will be upheld and which will be determined to be in violation of our 'new' antitrust policy." (p. 58)

A comment in 10 Villanova Law Review 366 (1965) states:

> "Placing the principal case [Simpson] into the formula of the previous decisions presents a formidable task. While an agreement to set the price at which gasoline was to be sold is present there was no resale agreement since the retailers were consignees. The consignment was not held by the Court to be a mere fabrication to circumvent the Sherman Act, and the only alternative explanation is that *a new rule has been formulated.* * * *
>
> "Left unanswered in the present case, to the dismay of those who may be subjected to treble damage suits, is the

determination of where the line differentiating legal and illegal consignments will be drawn. * * * [p. 368]

"Another problem created by this decision is the effect it will have on those who, in good faith, entered into consignment agreements in reliance on the rule set down in the *General Electric* case. * * * *The majority recognized that agreements might have been entered into in reliance on the General Electric doctrine and stated that the new rule would be applied in such cases prospectively.* * * *

"Here then the Court * * * *has taken away the protection previously afforded by the General Electric case* * * *." (p. 369)

A comment in 18 Vanderbilt Law Review 222 (1964), calls the *Simpson* rule "the new rule governing consignments" (p. 228).

Commentary on the *Simpson* case continues to come forth. In Joseph F. Brodley's "Oligopoly Power Under the Sherman and Clayton Acts—From Economic Theory to Legal Policy", 19 Stanford Law Review 285 (January 1967),[22] the author tries to find an explanation of the decision in the idea of "oligopoly" which he states is beginning to enter the law, although he confesses that no such explanation was avowed in the opinion. Says Mr. Brodley (p. 320):

"Then came *Simpson v. Union Oil Co.* in which, *for the first time with relation to the facts of an actual case,* the connection was made (although not explained) between resale price maintenance and oligopoly power. *Prior to Simpson an effective method* of nationwide resale price maintenance *existed in the form of consignment agreements* (provided the manufacturer was willing to assume the legal burdens of the consignor-consignee relationship). In Simpson the *Supreme Court overturned this long-standing rule* in the context of a highly concentrated oligopoly market, seemingly in a conscious effort to control oligopoly power further."

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22. This article is cited by Mr. Justice Harlan in his concurring opinion in *Federal Trade Commission v. The Procter & Gamble Co.,* 386 U.S. 568 (1967) at 583, n.1; 586, n.5.

In footnote 170, the author adds:

> "See United States v. General Elec. Co., 272 U.S. 476 (1926). *The rule of this case had been accepted and relied on by distinguished antitrust practitioners. See* Stewart, *Exclusive Franchises and Territorial Confinement of Distributors,* Section of Antitrust Law, ABA, Proceedings at the Spring Meeting 33, 39-40 (1963)."

D. The Reprehensibility of Simpson's Own Conduct

Another factor in denying retroactivity to the new rule concerning consignment so as to give appellant a windfall is that in terms of morals and common law Simpson had obtained that possession of Union's station *by fraud and false pretenses.* He obtained possession by promising that whatever Union gasoline he chose to receive he would receive and handle as an agent and, as an agent, he would honor his principal's price instructions, all as he was obligated to do both in morals and by the California Civil Code, § 2027; *Bare v. Richman & Samuels, Inc.,* 60 C.A.2d 413, 140 P.2d 895. Except for that promise he never would have become a lessee in the first place.

One who makes a promise which he does not intend to perform is guilty of deceit and fraud. Cal. Civil Code §§ 1709, 1710.[23] California Penal Code § 532 provides that anyone who

> "by any false or fraudulent representation or pretense * * * gets possession of money or property * * * of another, is punishable in the same manner and to the same extent as for larceny * * *."

Thus Simpson was guilty, under California law, of fraud and of obtaining property under false pretenses, the property being that very possession of the service station on which his fantastic verdict

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23. Section 1709 provides:

> "One who wilfully deceives another with intent to induce him to alter his position to his injury or risk, is liable for any damage which he thereby suffers."

And Section 1710 provides:

> "A deceit, within the meaning of the last section, is * * *:
> "4. A promise, made without any intention of performing it."

rests, for it is clear that Simpson had no intention of honoring his consignment agreement. The District Court so found. Its Findings 8 and 10 read (2 R. 544, 545):

> "8. Plaintiff executed the consignment agreement and thereby obtained the lease from Union and possession of said service station without any intention of abiding by the provisions of the consignment agreement or honoring his commitment thereunder whenever he did not wish to do so.
>
> *   *   *   *   *   *   *
>
> "10. By the legal principles of California contract law and by the legal principles of California real estate law, apart from application of the rule of antitrust law first announced by the Supreme Court in *Simpson v. Union Oil Company of California* on April 20, 1964, plaintiff seriously breached his contractual duties and obtained possession of defendant's service station by a promise made without any intention to perform it."

Those findings are supported by Simpson's own testimony that he had the idea that consignment was illegal before he entered into the first lease (R. 1688-95) and that when he signed the first lease and consignment agreement, he considered them as so much "crap" (R. 1695). He harbored that idea when he signed the consignment agreement in order to obtain possession of Union's service station; he intended to flout the agreement whenever it served his purpose.[24]

The lack of morals in Simpson's conduct is so obvious as to have been the subject of comment by impartial writers. Professor James A. Rahl of Northwestern University Law School, in "The Demise of Vertical Price Fixing Through Consignment Arrangements: The Simpson Case", 29 A.B.A. Antitrust Section 216 at 217, writes:

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24. Appellant argues (App. Op. Br. 49) that under general law a factor may at any time renounce an agency. But an agent, renouncing an agency, has never before had the right to impose on his principal a new relationship and keep possession of property entrusted to him by virtue of the renounced agency.

> "By one set of legal principles, Simpson had seriously breached his contractual and leasehold duties. As a consequence, he was summarily removed from the premises by a California court in a detainer suit."

Professor Rahl repeated that statement in "Control of an Agent's Prices: The Simpson Case—A Study in Antitrust Analysis", 61 Northwestern University Law Review 1, 4 (1966).

This Court, on the first appeal, had a similar reaction to Simpson's conduct. Its opinion, 311 F.2d 764, notes that Simpson "went into this deal with his eyes open and knew all the facts" (p. 768).

Although appellant attacks the findings, he does not deny the facts. Instead he argues (App. Op. Br. 44-46, 48, 49) that Simpson's familiarity with the consignment arrangement before he became a lessee was held by the Supreme Court to be irrelevant.[25] Here, as throughout his brief, *appellant confuses facts and holdings relevant to the question of what should be the new rule of law with the entirely different question of relevance to the equity issue whether the new rule of law should be retroactively applied.* Of course, if anyone were *now* to act as Simpson did, antipathy to the lack of morals in that conduct would have to succumb to the supremacy of the Sherman Act as now declared. But the issue in the instant case *is the equity or fairness of applying that rule to the events of 1956-1958.*

E. Answer to Miscellaneous Arguments of Appellant

Repeatedly appellant makes arguments that overlook the difference between facts relevant to the Supreme Court's announcing the new rule and facts relevant to the question whether that rule should be applied retroactively.

1. ALLEGED "COERCION"

Typical of appellant's confusing unlike matters is his argument that Union used consignment "coercively" (E.g., App. Op. Br. 38,

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25. This is the subject matter of his Specification of Errors No. IV D (App. Op. Br. 12).

40). The Supreme Court's decision does use the term "coercion". But the slightest consideration shows that what that Court meant by "coercion" was just as present in *General Electric* as here. All the commentators on the *Simpson* case agree that the notion of "coercion" cannot distinguish *Simpson* from *General Electric.*

The District Court found (Finding 7, 2 R. 544):

> "7. Except in the sense hereafter specifically described, at no time did the defendant subject the plaintiff to any compulsion, duress or coercion, and plaintiff was in no way coerced or compelled to become or remain a dealer of defendant, a lessee of defendant, or to execute a consignment agreement with defendant. Before becoming a lessee and before executing the consignment agreement, plaintiff knew that the defendant was not willing to merchandise its branded gasoline through service stations owned or leased by it except through the agency of consignees and that, unless he was willing to execute a consignment agreement, it was not willing to lease its station to him. Plaintiff had entire freedom of choice and fully exercised free judgment either to contract with defendant on terms mutually agreeable to the two contracting parties or, if the terms on which defendant was willing to contract and upon which it was willing to give possession to plaintiff were not agreeable to him, to refrain from contracting. Only in the sense and only if it be concluded that refusal to deal with plaintiff or to grant him a lease on other terms or efforts to have defendant honor his commitments under what was honestly believed by defendant to be a lawful agreement constituted coercion can it be said that defendant coerced the plaintiff."

That finding is supported by the facts summarized in this Court's opinion on the first appeal, 311 F.2d 764 at 768, and by the stipulation which forms a keystone in appellant's case.[26]

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26. In the pre-trial proceedings leading up to the stipulation of facts upon which the Supreme Court based its decision, Simpson's counsel stipulated that the only "coercion" was Union's refusal to deal except on terms acceptable to it. The following colloquy occurred (First R. 379, 380) and was read by Simpson counsel at the trial (R. 262-3):

> "Mr. Lasky: * * * when plaintiff alleges that he was compelled to accept a one-year lease and he was compelled to accept

Nothing in the further record at the trial disturbed these facts. Stripped of verbiage, Simpson's grievance is that he wanted to do business with Union, but it refused to do business with him on *his* terms. He wished to occupy *its* property and sell *its* gasoline but on *his* own terms. Union informed Simpson of the basis on which it wished to merchandise its gasoline on premises owned by it, and he accepted the terms.

What Simpson calls "coercion" is simply the position taken by Union that if Simpson wished to contract with it or to acquire a leasehold in Union's property. Union would deal with him only on terms satisfactory to itself. The Supreme Court has chosen to call *that* "coercion". Therefore, it must be deemed *for the future* that the facts are of the kind described as "coercive" in whatever sense is necessary to make consignment illegal *from and after April 1964,* if coercion in any sense is indeed necessary to that end. But the use of the term is not a fact that can distinguish the

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a consignment agreement, does he mean anything more than this: That if he wanted to get a lease on this property and he wanted to handle Union products the only type of contract we would give him by which we would deal with him was a one-year lease and a consignment contract—if that is what he means when he says he was coerced into taking it, because if he didn't take that, we wouldn't deal with him, then I say those are the facts: Either he took our consignment contract and our lease or we wouldn't deal with him.

"The Court: That is precisely what you mean by the word 'compel'?

"Mr. Keith: *This statement is correct.*"

It may be added that nothing compelled Simpson to obtain gasoline from Union, even after becoming a lessee. The fact—stipulated by Union for the purpose of the case—that it would lease its realty only to one who would execute a consignment agreement—was not a tie-in within the meaning of any of the cases. By signing a consignment agreement a lessee did *not* agree to take *any* quantity of gasoline *at all* from Union, nor did he preclude himself from obtaining gasoline from anyone else. The consignment agreement merely specified the terms on which any gasoline the lessee *saw fit to take from Union* would be handled (P. Ex. 57, ¶ First). In short, concurrently with leasing a station Union was informing the lessee that it would not be selling gasoline to him and that, if he should obtain gasoline from it, he would be doing so as an agent. After signing the agreement, he was still free to get his gasoline elsewhere. See the opinion of this Court on the first appeal, *Simpson v. Union Oil Co.,* 311 F.2d 764, at 766, bottom of first column.

General Electric case. As Professor Handler in 63 Mich. Law. Rev. 59 said:

> "Many times in his opinion, Mr. Justice Douglas characterizes the consignment as 'coercive'. But he never pauses to explain how he reaches this conclusion or to indicate the sense in which this term is used. He speaks of dealers having been deprived of 'the exercise of free judgment whether to become consignees at all, or remain consignees,' but the court of appeals emphasized that Simpson was completely aware of Union's consignment policy and had entered into the arrangement as a 'result of his own free and deliberate choice.' The Court refers to no evidence of any compulsion or duress practiced upon Simpson or any other dealer. If Mr. Justice Douglas had in mind the disparity of economic power between the oil company and its dealers, the fact, of course, is inarguable, but the conclusion is a *non sequitur.* No court has ever proclaimed that inequality of bargaining power connotes coercion as a matter of law. Any such ruling would cast an ominous shadow over countless commercial arrangements.
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> "* * * The highest Court, with its immense powers, can by sheer fiat stigmatize even the most innocuous arrangement as unlawful, but it cannot repeal the laws of logic or alter the meaning of the English language. That the shortness of the term of the dealer lease is but a makeweight is irrefutably attested by the blanket condemnation of Union's agreements with 1,327 non-lease consignees. In affixing its label of coerciveness to Union's consignments, the Court nowhere differentiates between lessee and non-lessee dealers." (pp. 64-5)

As the last passage recalls, 1,327 of Union's consignees had no leases from Union, but had their own stations. But the Supreme Court struck down all Union's consignments. *Thus the element of a "lease" was not the ground of the Court's decision.* The decision rests on an overruling of *General Electric.* Moreover, until the Supreme Court spoke, no one would have supposed that a connection with a lease was any distinguishing element. Indeed, the Consent Decree in the *West Coast Oil* case explicitly provided (D. Ex. P) for an express cross-conditioning of lease and consignment. That Decree required Union to offer its dealers both a supply agreement, which could be a consignment, and a lease (¶ XII

(B)), provided that each could specify that it would be terminated for breach of any provision, and that (¶ XII(D))

> "Where a dealer holds such an agreement and such a lease covering the same location each or either of them may provide in substance or effect that a breach of one shall constitute a breach of the other and/or that the cancellation or termination of one shall be effective to cancel or terminate the other."

It is not conceivable that the Government would have consented to this provision, or that the District Court would have approved it, if this kind of arrangement was then thought to be some kind of coercion. And Union cannot now be condemned as having been irrational for not supposing that the presence of a lease destroyed its right to sell its gasoline by consignment.

Professor Rahl said of the *Simpson* decision (29 A.B.A. Antitrust Section 216):

> "Although thus failing to provide a tight analysis at this critical point, the opinion did go on to emphasize two reasons for its condemnation of the Union plan, neither of which need be present in all consignments. These were (1) that the Union plan was 'coercively used,' and (2) that the plan had an 'inexorable potentiality for and even certainty in destroying competition in retail sales of gasoline by these nominal "consignees" who are in reality small, struggling competitors seeking retail gas customers.' When the 'consignment' device is used, said the Court, 'to cover a vast gasoline distribution system, fixing prices through many retail outlets' . . . then 'the antitrust laws prevent calling the "consignment" an agency,' immune from antitrust violation. (It should be noted that in the last-quoted sentence, the Court said that this evidently valid consignment plan was not an 'agency.')
>
> "* * * *The GE plan could not possibly escape the very same characterizations given above as the Court's second reason.* The only possible difference might be in the first reason that the lease cancellation privilege in *Simpson* gave Union Oil somewhat more coercive power over its dealers than that possessed by General Electric.[27] The latter's dealers, being

27. There was, in fact, no "lease cancellation privilege in *Simpson*." Union did not cancel a lease; it simply did not give a new one.

general merchants, normally would not be as dependent upon GE for their livelihood as the service station operators were upon Union. *The Court itself, however, did not offer any such distinction, probably because it is extremely thin on its face.*" (p. 221)

*   *   *   *   *   *   *

"In any event, a long life cannot be predicted for this 'coercion' theory for the simple reason that it does not make good antitrust sense. * * * [p. 222]"

And in 61 Northwestern Law Review, at page 3, Professor Rahl states that in *Simpson*

> "* * * the Court placed some reliance upon the presence of what it treated as 'coercion' of the dealers concerned." But it ". . . *found 'coercion' in the simple fact of the exercise or attempt to exercise ordinary business bargaining power.* * * *"

And further:

> " * * * But the Court refrained from express, critical reliance on factual differences between the consignment-agency aspects of the two plans [*General Electric* and *Union Oil*] *because, we shall assume, they were indeed too similar to support a different outcome antitrust-wise.* [pp. 5-6]
>
> "In any event, will not coercion in the sense involved in *Simpson* almost always be present where vertical price controls are being used with competing dealers? The opinion did not really describe the facts supporting the conclusion that coercion was involved; but apparently it amounted to no more than ordinary insistence upon the consignment form of contract, and exercise of the legal power of severance of business relations for its breach. It is hard to see how any manufacturer could hope to maintain the uniformity needed to control the prices of competing dealers through consignment, without insisting that the method be used." (p. 9)

The comment in 2 Tulsa Law Journal 55 at 56-7 states:

> " * * * From the Court's opinion we are forced to assume that a true agency relationship existed in the form of a valid consignment agreement. Nevertheless, the Court held that the agreement violated the federal antitrust laws. The Court uses

the word 'coercive' in certain instances when describing the Retail Dealer Consignment, however, the question of whether the agreement was coercively entered into did not appear to be a factor in finding the 'consignment' to be a violation of the federal antitrust policy."

A comment in 37 University of Colorado Law Review 293 (1965) states:

"One key to the decision in *Simpson* was the holding of the consignment as 'coercive.' *However, under the Court's previous tests Union Oil's plan was neither 'coercive' nor different from other sanctioned plans.* Under the *General Electric* test there was a clear agency in *Simpson* * * *. *Yet the arrangement in Simpson comes much closer to being a true agency than the one in General Electric.* Simpson's acceptance of the lease and consignment agreements, with full knowledge of their implications, would seem to remove *the 'coercion' aspect when the hardships involved are seen as the mere enforcement of that for which Simpson bargained.* Union Oil obviously reserved no more power over Simpson than did General Electric over its retailers." (p. 294)

A comment in 17 Stanford Law Review 519, 521-23 (1965) states:

"The *Simpson* opinion assumes throughout that Union 'coercively laced' its dealers into becoming consignees. Clearly Union's policy was to lease stations, whenever possible, only when the lessee would also enter into a consignment contract. * * * Where the manufacturer distributes directly to the retail outlet, as in *Simpson,* no boycott issue is raised. Secondly, *application of the illegal coercion theory in the refusal-to-deal doctrine to a consignment situation is unprecedented and somewhat anomalous.* Implicit in the refusal-to-deal concept is a *sale* by a supplier to a wholesaler or retailer, in which any coercion is properly reprimanded. *But where the parties have voluntarily entered into the relationship of principal and agent, the coercion rationale is less appropriate because the agent will have accepted the restriction on his freedom to deal with the goods that this relationship entails.* Since Simpson had operated a service station only as a con-

> signee of Union, and never as an independent retail seller, application of an even more general coercive practice rationale, as *Simpson* seems to find in *Parke Davis,* is unwarranted."

The Stanford Law Review article goes on to suggest that because the *Simpson* case involved a lease and *General Electric* did not, Union Oil's consignment *was more legal* than *General Electric's,* because Union's consignees were obviously Union's agents in every real sense. When a critic can come to that conclusion, it is self-evident that Union was justified in not supposing that the element of lease had any relevance at all to the legality of its consignment.

2. ALLEGED DIFFERENCES BETWEEN THE CONSIGNMENT AGREEMENTS IN THIS CASE AND GENERAL ELECTRIC.

Appellant also attempts to distinguish the *General Electric* from the *Simpson* case on the basis that there were differences between the two consignment arrangements (App. Op. Br. 43). But, as the District Court here found (Finding 3, 2 R. 542):

> "The form and substance of the consignment agreement devised and thereafter used by defendant were modeled upon and were substantially the same as the consignment agreement and arrangement of the General Electric Company which had been upheld in said *United States v. General Electric Co., supra,* and like the consignment agreement and arrangement used by *General Electric Co.* and involved in that case was true and *bona fide.*"

Appellant does not indicate why any differences that existed should have any relevance, and the differences were trifling. Appellant's assertions on the subject are either incorrect or pointless.

Thus appellant states that *General Electric* "assumed all the risks of the fire, flood or obsolescence, whereas Union did not." But Union assumed the risks of "fire, explosion, earthquake, lightning, flood" (Consignment Agreement, P. Ex. 57, ¶ "Second (6)"), and obsolescence is inapplicable to gasoline. Appellant states that General Electric paid all taxes assessed on the stock

of lamps, whereas Union Oil Company paid only property taxes. But "taxes assessed on the stock of lamps" and "property taxes" are synonymous. The taxes Union's consignees had to pay were taxes on their businesses and operations; no more did General Electric assume such taxes. Appellant argues that "General Electric carried whatever insurance is carried on the stock held by the consignees whereas Union Oil Company apparently was not required to carry any insurance." But Union did *not* require the consignee to cover the "stock", i.e., the gasoline, with insurance. Since Union remained the owner, it assumed all the risks of the kind against which one might wish to insure, and whether it protected itself by insurance or not was no concern of the dealer. The only insurance Union's consignees were obligated by the agreement to carry was in connection with an indemnification of Union against liabilities for damages to persons or property "occurring in connection with the conduct of his [the consignee's] business" (Ibid., ¶ "Second (4)").

Not a single case or commentator agrees with appellant that there was any relevant difference between the consignment setup in *Simpson* and that in the *General Electric* case. The majority opinion in the Supreme Court in the *Simpson* case acknowledged that the General Electric plan "somewhat parallels" Union's plan (377 U. S. 13, 22). In a footnote it mentioned a few differences but attached no significance to them. Mr. Justice Stewart's opinion observes:

> "The fact of the matter is * * * the two agreements [GE and Union] are virtually indistinguishable."[28] (377 U.S. at 26)

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28. He added, in footnote 1:

"Without commenting on their significance, the Court does purport to discover in the operative provisions of the two agreements factual differences regarding the tax and insurance burdens assumed by the consignors. On closer examination, however, even these purported differences disappear. From the records in the cases, it is clear that both companies assumed the same tax burden—payment of property taxes on the consigned goods. And since both companies bore virtually the same insurable risks of loss or damage to the goods consigned, the fact that General Electric apparently 'carried "whatever insurance is carried" on the stock held by con-

Professor Rahl characterizes the majority's reference to differences between the General Electric plan and the Union plan as "toy[ing] inconclusively with a few differences" (Rahl, 61 Northwestern Law Rev. 1, 5; also 29 A.B.A. Antitrust Section 216, 219) and says:

> "But the Court refrained from express, critical reliance on factual differences between the consignment agency aspects of the two plans, presumably because they indeed were too similar to support a difference antitrust-wise." (*Id.* at 219.)

17 Stanford Law Review 519, 521-2 remarks that the differences between the General Electric and Union contracts "were so minute as not to constitute adequate ground for distinguishing the cases"; indeed that the two were "so strikingly similar" as to show reliance.

At p. 47, supra, we quoted a passage from *Lyons v. Westinghouse Electric Corp.,* 235 F.Supp. 526, 535 (S.D.N.Y. 1964), that the factual differences between the two plans pointed out by the majority were "comparatively minor, and I do not understand the Court to say that it considered them sufficient to create any real distinction." Whatever the differences were, they did not render Union's consignment system any less a true agency than *General Electric,* and all the cases and commentators agree that the Supreme Court did not hold Union's not to be a true agency. It merely held that ordinary concepts of law have to give way to antitrust concepts and in this respect simply overruled *General Electric.* In an address to the Antitrust Section of the American Bar Association, "Relationships of Antitrust to Conventional Legal Categories", 26 A.B.A. Antitrust Section, p. 144 (1964), Mr. Paul C. Warnecke, later General Counsel of the Department of Defense, stated (p. 146) that the *Simpson* case

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signees, while Union Oil apparently is not obligated to carry any insurance' is no distinction at all.

* * * * * * *

"* * * The Court in *General Electric* explicitly observed that a provision placing the burden of risk of loss or damage to goods on the consignee 'is only a reasonable provision to secure [the consignee's] careful handling of the goods entrusted to him.' Id., at 484."

> "involved what the majority opinion agreed was a perfectly valid consignment * * *. But the Supreme Court stated: 'a consignment, no matter how lawful it might be as a matter of private contract law, must give way before the federal antitrust policy.' "

3. NONE OF THE CASES CITED BY APPELLANT IS RELEVANT.

Appellant asserts (App. Op. Br. 42, 50) that Union had no right to rely on the *General Electric* case in view of *United States v. Masonite Corp.,* 316 U. S. 265 (1942). Professor Handler, in his discussion of the *Simpson* case, "Recent Antitrust Developments—1964", 63 Mich. L. Rev. 59, 64 says:

> "One thing is clear. The Court did not invalidate the consignment arrangement because of any horizontal price-fixing conspiracy, as it did in *Masonite* * * *."

No method, however legal it is when done unilaterally, can validate a horizontal price fixing conspiracy between competitors, which is all that *Masonite* held.

Appellant (App. Op. Br. 47, 50, 51 and elsewhere) belittles the study of the law made by Union's General Counsel because he did not attach significance to *United States v. Richfield Oil Co.,* 343 U.S. 922 (1952) and *Times Picayune Pub. Co. v. United States,* 345 U.S. 594 (1953). In like manner appellant cites the old workhorses of the antitrust law, *United States v. Socony-Vacuum Oil Co.,* 310 U. S. 150 and *Federal Trade Commission v. Beech-Nut Packing Co.,* 257 U. S. 441. *Richfield, Times-Picayune* and *Beechnut* are so irrelevant that, although cited in Simpson's brief in the Supreme Court, they were not even mentioned in that Court's opinion. *Socony Vacuum* is merely the basic case on price fixing and has no bearing on whether consignment is "price fixing". *United States v. Parke-Davis & Co.,* 362 U. S. 29, also cited, involved conspiracy with wholesalers and did not involve consignment.

Finally, appellant (App. Op. Br. 55) cites the Federal Trade Commission's proceedings against *Sun Oil Company* and its proceedings against *Atlantic Refining Company* as a reason why

Union could not rely on the *General Electric* doctrine. There was no decision in *Sun,* and there was not even a complaint filed against Atlantic, until after Simpson's lease had expired and he had left the premises.[29] And the charges in the two cases were quite foreign to what Union was doing. The complaint in *Sun* made two charges (P. Ex. 81): (1) that Sun's arrangement was not in fact a consignment but "a fiction and a subterfuge" (Id., ¶ 4, p. 3), and (2) that Sun and others had entered into a combination and agreement to fix prices (Id., ¶ 5, p. 4). It did not assert that a *bona fide* consignment was unlawful or cast any doubt on the principle that, absent a horizontal conspiracy, consignment was valid. If it had been thought that *General Electric* was no longer good law, the allegations of subterfuge and horizontal conspiracy would have been unnecessary surplusage. That the Commission proceeded against Sun (and later Atlantic) upon charges of *fictional* consignment used to cloak a horizontal conspiracy *and never proceeded against Union* is plain evidence that the Commission did not even find an "unfair method of competition", much less a Sherman Act violation, in Union's consignment.[30] In its eventual decision the Commission said, "* * * Sun, unlike *United States v. General Electric Co.,* 272 U. S. 476 (1926) did not content itself with unilateral vertical arrangements but instead joined with its dealers in horizontal arrangements * * *" (1963 C.C.H. Trade Reg. Rep. ¶ 16,418, p. 21,279).

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29. The initial decision of the Commission's hearing examiner in *Sun* was issued May 17, 1962, four years after Simpson vacated the premises. (1962 C.C.H. Trade Reg. Rep. ¶ 15,909). The opinion of the Commission was issued May 15, 1963 (1963 C.C.H. Trade Reg. Rep. ¶ 16,418), and the case was decided in the Court of Appeals on August 19, 1965, *Sun Oil Company v. F.T.C.,* 350 F.2d 624 (7 Cir.).

The Commission's complaint in *Atlantic* was filed on April 24, 1959 (1959 C.C.H. Trade Reg. Rep. ¶ 27,964.), about a year after the facts of this case were history.

30. In the *Sun* case the hearing examiner found on the evidence that (1962 C.C.H. Trade Reg. Rep. p. 20,725):

> "the agency consignment agreement was a fiction or subterfuge, not a bona fide agency and in fact constituted an agreement or conspiracy among Sun and its dealers to fix resale prices * * *."

Professor Handler, in his article in 63 Mich. L. Rev. 59, 64 (1964), states of the Supreme Court's decision in *Simpson:*

> "One thing is clear. The Court does not invalidate the consignment arrangement because of any horizontal price-fixing conspiracy as * * * the Federal Trade Commission ruled in *Sun Oil.*"

And when the Seventh Circuit affirmed the Commission's *Sun Oil* decision in 1965, *Sun Oil Co. v. F.T.C.,* 350 F.2d 624, cert. den. 382 U. S. 982 (1966), it recognized that the *Simpson* decision went far beyond *Sun.* At p. 47, supra, we quote the relevant passage from that opinion.

The decision of the Commission's hearing examiner in *Atlantic* rendered on March 7, 1962, held that Atlantic's consignment agreements were *lawful* because they were within the principles of the *General Electric* case (1962 C.C.H. Trade Reg. Rep. ¶ 15,786, p. 20,601). When the Commission reversed the Examiner, it did so on the basis of a finding that Atlantic was conspiring with its wholesale distributors, *who were purchasers, not consignees,* to fix retail prices and did not truly consign to its retailers at all but shifted back and forth from day to day between "consignment" and "sale" when necessary to carry out the conspiracy with the wholesalers (1963 C.C.H. Trade Reg. Rep. ¶ 16,422 at p. 21,289). Professor Handler, 63 Mich. L. Rev. 59, 64, states:

> "Nor does Mr. Justice Douglas purport to outlaw the consignment system, as in the Commission's decision in the *Atlantic Refining* case, on the ground that it was used only 'at irregular intervals and in certain markets during price wars' and was not the regular method by which the company sold its products. Quite to the contrary, Union's program had been in effect for close to a decade and was its regular method of doing business."

The Supreme Court's decision in the *Atlantic* case (*Atlantic Refining Co. v. Federal Trade Commission,* 381 U. S. 357) was rendered in 1965, one year after its decision in the *Simpson* case, as was *Federal Trade Commission v. Texaco,* 381 U. S. 739.

4. IRRELEVANCE OF INTERIM REPORTS OF HOUSE SMALL BUSINESS SUBCOMMITTEE.

Appellant refers to two Interim Reports of the so-called Roosevelt Subcommittee of the House Small Business Committee, P. Ex. 75 for identification, dated July 26, 1955 and P. Ex. 80 dated August 14, 1957 (App. Op. Br. 52). The Interim Report of July 26, 1955, says nothing about the legality of consignment. The Report of August 14, 1957 recommended that:

> "4. The Department of Justice investigate the present influence of consignment, commission, and *company-operated stations* in *price leadership,* maintenance or fixing, or in price discrimination against independent lessee-dealers, as *possible* violations of the antitrust laws." (p. 17).

This was no more than a request to investigate whether consignment was being used as part of a *conspiracy,* for it speaks of company operation in the same breath. Nothing in that passage could charge Union with knowledge that seven years later the Supreme Court would hold that Union's *unilateral* use of consignment was unlawful.[31]

The recommended investigation by the Department of Justice of what part, if any, consignment played in violation of the antitrust laws was in fact made in the *West Coast Oil* case. In the course of that investigation, the Department and the court were fully informed of Union's consignment, as Judge James M. Carter's opinion of October 12, 1958 reflects, *United States v. Standard Oil Company of California,* 1958 Trade Cas. ¶ 69,212. Then, having conducted the investigation requested, the Department agreed to and the court entered its final decree expressly authorizing Union to enter into consignment agreements in discharge of

31. It would be as logical to argue that Standard Oil Company should then have discontinued company operation of stations, or that large merchants should now cease advertising because on June 6,1966, the Chief of the Antitrust Division stated to the Federal Bar Association (5 Trade Reg. Rep. p. 55,207):

> "a number of business practices have been attacked as imposing unacceptable restraints on competition. . . . heavy advertising outlays lead both to more concentrated market structures and to the establishment of high monopolistic prices . . ."

the obligation imposed by the decree to give supply agreements. As we have seen (p. 44, supra), counsel for the Small Business Committee has said that "consignment is expressly recognized as a legitimate means of distribution of gasoline in the Consent Decree entered in the *West Coast Oil* case."

II.

DEFENDANT'S MOTION FOR A NEW TRIAL WAS PROPERLY GRANTED

The jury returned a verdict of $160,000 single damages, a sum which invested at 5% would yield an annual return of $8,000 without any diminution of principal. Simple interest alone would enable Simpson, an able-bodied man, to retire and receive an annual income greater than any he had ever before earned, and then leave a small fortune to his heirs. Trebling the verdict to $480,000 would be trebly fantastic. In the words of the trial court (R. 1803):

> "After the verdict was returned and I left the courtroom I was shocked with it just as I am now. There was more speculation, guesswork and conjecture in making up the sum of $160,000 than I have ever experienced with a jury and a return of a jury verdict . . . ."

For this and other very substantial reasons a new trial was granted

> "on the grounds that the verdict is against the weight of the evidence, shocks the conscience, is grossly and monstrously excessive, is the result of either passion or prejudice or of consideration by the jury of factors irrelevant to the litigation, is speculative, conjectural and a miscarriage of justice." (2 R. 550)

A. Principles Governing Grant of New Trial: the Trial Court Has the Right and the Duty to Weigh the Evidence and to Set Aside the Verdict as Against the Weight of the Evidence or as a Miscarriage of Justice

The grant or denial of a motion for a new trial rests within the sound discretion of the trial court and will not be overturned unless a clear abuse of that discretion is shown. *Oswald v. Cruz,*

289 F.2d 488 (9 Cir. 1961); *Moist Cold Refrigerator Co. v. Lou Johnson Co.,* 249 F.2d 246, 256 (9 Cir. 1957), *cert. den.* 348 U.S. 952. This discretion is vested in the trial judge, for it is he "who saw and heard the witnesses and has the feel of the case which no appellate printed transcript can impart," and to present him with "an opportunity, after all his rulings have been made and all the evidence has been evaluated, to view the proceedings in a perspective peculiarly available to him alone." *Cone v. West Virginia Pulp & Paper Co.,* 330 U.S. 212, 216 (1947).

Appellant contends that the verdict was "well within the range of lost values to Mr. Simpson for the destruction of his business" (App. Op. Br. 61). Even if true, and it is fantastically false, it is an irrelevant statement misconceiving the governing principle.

Appellant quotes (App. Op. Br. 62) general language respecting jury verdicts from *Liquid Veneer Corp. v. Smuckler,* 90 F.2d 196 (9 Cir. 1937) and other cases.[32] But in each of these cases a new trial was *denied,* not granted. Where the trial court in its discretion has refused to grant a new trial, this Court has traditionally been reluctant to interfere. See, *e.g., Union Pacific R. Co. v. Johnson,* 249 F.2d 674 (9 Cir. 1957) *rev'd on other grounds* 352 U.S. 957; *Southern Pacific Co. v. Guthrie,* 186 F.2d 926 (9 Cir. 1951) *cert. den.* 341 U.S. 904; *Southern Pacific Co. v. Zehnle,* 163 F.2d 453 (9 Cir. 1947). But here the motion was granted, and properly so.

The trial court's responsibility in ruling on a motion for a new trial was set forth by this Court in *Moist Cold Refrigerator Co. v. Lou Johnson Co., supra,* 249 F.2d at 256:

> "But having permitted the jury to come to its conclusion on the facts, the trial judge then *had the right, and indeed the duty, to weigh the evidence as he saw it,* and to set aside the verdict of the jury, *even though supported by substantial evidence,* where, in his conscientious opinion, the verdict is contrary to the weight of the evidence or based upon evidence which is false, or to prevent, in the sound discretion of the trial judge, a miscarriage of justice."

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32. *Peterman v. Indian Motorcycle Co.,* 216 F.2d 289 (1 Cir. 1954) and *Mainelli v. Haberstroh,* 237 F.Supp. 190 (M.D. Pa. 1964).

Appellant contends for a rule identical with that governing a motion for judgment notwithstanding the verdict. That is not the law. A judgment notwithstanding the verdict is improperly granted where there is evidence to support the jury's verdict, but as stated in *Williams v. Nichols,* 266 F.2d 389, 393 (4 Cir. 1959):

> "In passing upon the motion for a new trial and in considering the evidence in the light most favorable to the plaintiff, the trial court applied the standard applicable to a motion for a directed verdict or judgment n.o.v., rather than exercising his own independent judgment after a weighing of *all* the evidence and any other pertinent factors in determining whether the verdict was against the clear weight of the evidence or would result in a miscarriage of justice.
>
> * * * * * * *
>
> "The case is accordingly remanded for reconsideration of the motion to set aside the verdict and for a new trial, not in the light most favorable to the plaintiff, but according to the analysis and appraisal by the *trial court* of the weight of all the evidence . . ." (Emphasis in original)

B. The Verdict Was Manifestly Excessive and Unsupported by the Evidence

As appellant recognizes by limiting his argument (App. Op. Br. pp. 60-61), if any substantial sum of damages is to be justified, it must be on the basis of Union's refusal to give appellant another lease.[33] We accordingly confine our discussion to that question, assuming, for purpose of argument, that Union's refusal furnished a legal basis for a claim of damage. Appellant's damage theory is that he had a business which Union's refusal to lease destroyed, and that this business had enormous value (App. Op. Br. 60, 61). The theory is false, the business had no value, and appellant sustained no damage.

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33. All other damage claims were trivial afterthoughts, i.e., an alleged loss of $119.05 on the sale of equipment (P. Ex. 59, 62 and R. 667-69); that a filing cabinet for which he paid $140 became valueless (R. 651-52); that Simpson was "overcharged" $331.34 for gasoline (R. 658-63); and that if he had at all times received a "net margin" of 6¢ per gallon on those days when he did not, and had sold the same amount of gasoline, he would have grossed an additional $1,000.94. (P. Ex. 63).

1. THE UNDISPUTED FACTS.

For two years beginning May 23, 1956 Simpson leased Union's station. His earnings experience in that period fairly reflects the station's earning capacity. It had been an up-and-going concern for eight months when Simpson began operating it without any closedown. (D. Ex. J, R. 804). Simpson's "profit and loss" statements, both those *in extenso* (P. Ex. 58) and a tabulation (D. Ex. M), show that under his operation sales of gasoline at the station averaged 12,531 gallons per month. In the entire 11 years' history of the station up to the time of trial, Union's deliveries of gasoline to the station averaged only 13,560 gallons per month. (D. Ex. J).

After Simpson's lease expired in May 1958, Simpson remained in possession of the station until June 5, 1958 under a temporary restraining order. He then moved to a Mobil station which he operated for about two years. (D. Ex. K). On June 28, 1960 he left this Mobil station, voluntarily and before his lease there expired. (R. 876). Since leaving the Mobil station, appellant neither sought to obtain a dealership at any service station nor had he any desire to become a dealer for any oil company. (R. 876).

Appellant's "profit and loss" statements show that his take-home averaged $473.43 per month from the Union station and $476.95 per month from the Mobil station. (D. Ex. K, p. 1)[34] *But these figures represent no profits, for they make no allowance whatever for the value of Simpson's labor.* (R. 966). That is, a "profit" figure in appellant's "profit and loss" statements represents nothing but the excess of receipts over disbursements *before* Simpson paid himself anything for his work. During his first year at the Union station, appellant worked there 17 hours per day, 7 days per week. During the second year, he worked 12 hours per day, 7 days per week. (R. 586-587). In company-employee operated stations of the same size as that leased to Simpson, Union paid its managers $400-$420 per month for a 40-hour week, plus

34. His income tax returns show the figures as $401.33 per month and $468.61 per month, respectively (D. Ex. K, p. 2).

fringe benefits amounting to an additional $80 per month. (R. 512-513). This amounts, conservatively, to $3.00 per hour. It is therefore obvious, and the testimony of an experienced certified public accountant, that *there were no net profits* in this business and, accordingly, that the business had no value aside from the value of the inventory and equipment.[35] (R. 959-960, 981-984). This analysis of the matter was fully confirmed by Dr. Frank L. Kidner, professor of economics at the University of California. (R. 1021, 1051-1055).

Upon voluntarily quitting the Mobil station and the service station business, Simpson decided to become what he calls a physiotherapist (R. 876) and what his income tax returns call a masseur. These returns (D. Ex. I), show the following earnings from this endeaver:

1963	$4,870.68
1964	4,795.76
1965	5,136.65[36]

2. APPELLANT'S DAMAGE THEORY AND THE PAGLIN NUMBERS.

Appellant seeks to support his theory by various computations performed by Professor Paglin of Portland State College, all of which are premised on (1) the speculative premise that appellant would have continued to operate the station until he reached age 65, 24 years later, and on (2) the premise that the business generated actual net profits. Both premises are false.

The first is untrue because Simpson voluntarily quit the service station business two years after leaving the Union station. Here, as in *Seattle First National Bank v. Hilltop Realty,* 383 F.2d 309,

35. Which appellant sold to the lessee who replaced him. (R. 866-867).

36. From the time he left the Mobil station at the end of June, 1960, until 1963, *i.e.,* while Simpson was learning this new trade, Simpson's returns showed no income to him in 1960, $29.49 in 1961 and $1,606.58 in 1962. But the decision to learn this new trade was Simpson's. That he chose to abandon the Mobil station, where he was earning some $5,600 per year, and thereby sustain a temporary loss of earnings, is certainly not Union's responsibility.

312 (9 Cir. 1967), *cert. den.* .... U.S. .... (4/22/68), 36 U.S. Law Week 3404, the *actual events* are before the Court and there is no possible room for speculative prognosis, for "the proof of the pudding is in the eating." Or, as stated in *Independent Iron Works v. United States Steel Corp.,* 177 F.Supp. 743, 747 (N.D. Cal. 1959), *affirmed* 322 F.2d 656 (9 Cir. 1963), *cert. den.* 375 U.S. 922:

> "One must always measure what is claimed by plaintiff to have theoretically happened against what is mathematically proved by defendants to have actually happened.

At no time did Professor Paglin testify that any of the figures generated by him represented the value of appellant's business.[37]

Professor Paglin did nothing but compute the present value of various sums of money which Simpson might have earned by working in the station over a 24-year period. Thus, if one assumes that Simpson's labor would have produced for 24 years what it did in calendar year 1957 ($6,388), an amount of $97,388 is reached. If one averages Simpson's earnings for the three months at the Union station when they were highest,[38] one arrives at $809 per month or $9,700 per year which, over 24 years, amounts to $147,895. In the words of Professor Paglin (R. 765):

> "In other words, if he went to an insurance company and tried to buy what we call an annuity that would pay him $9,700 a year until his retirement, which is the amount he would have earned, let's say, had he continued in the station, the insurance company would sell him such an annuity for $147,895, approximately."

If this were relevant data in a wrongful death case, it is no evidence whatever of the value of a business. (R. 983). Simpson's

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37. P. Ex. 68, which refers repeatedly to "value of business", was admitted on the representation that it was merely a summary of Paglin's testimony. (R. 758). But it is not.

38. Which is obviously absurd (R. 984), particularly when the months are June, July and August, and the station is on the main highway to Sequoia National Park. (R. 577). The absurdity is demonstrated by the fact that the very next month, September, 1957, Simpson earned only $224.52 (D. Ex. K).

age and "remaining useful life" (App. Op. Br. 22) were as irrelevant to the value of his business as they were to the value of his house or his car.

In *Standard Oil Company of California v. Moore,* 251 F.2d 188 (9 Cir. 1957) *cert. den.* 356 U.S. 975, this Court had before it the question of valuing a retail gasoline business. There, as here, the operator was 41 years of age at the time he allegedly could no longer obtain gasoline and there, as here, the claim was that he wanted to continue operation. There, the operator owned the land and other capital assets of the business and retained them when he went out of business. Here, appellant owned nothing except his inventory and equipment, which he sold. This Court said (251 F.2d at 219-220):

> "It was Moore's contention that his business had been totally destroyed on August 15, 1952, when he could no longer obtain gasoline. He therefore asked the jury to measure his damages by the market value of the business on that date. Moore owned the land and the other capital assets of the business, and retained them when he went out of business. It follows that the only value which his business had before it was closed that it did not have afterwards was its 'going concern' or 'good will' value.
>
> "As one means of proving going concern or good will value, Moore produced the opinion testimony of an expert witness. The hypothetical question asked of this witness included, as one of its assumptions, that in August, 1952, Moore was forty-one years of age, was in reasonably good health, and wanted to continue the management of the service station. Appellants argue that the question, as so framed, was irrelevant to the issue.
>
> "We agree. In measuring the value of the good will of such a business, appropriate factors to be considered are: (1) *What profit has the business made over and above an amount fairly attributable to the return on the capital investment and to the labor of the owner?* (2) What is the reasonable prospect that this additional profit will continue into the future, considering all circumstances existing and known as of the date of the valuation? See Kimball Laundry Co. v. United States, 338 U.S. 1, 16-17, 69 S.Ct. 1434, 93

> L.Ed. 1765. These are the factors which would influence a prospective purchaser. The special value which the business might have to Moore, or the profit potential of the business beyond that which would be transferable to a purchaser, would have no effect on the market value of the business. Upon the retrial, the question should be framed to omit this irrelevant factor."[39]

The question reduces itself to this: When Union charges a dealer nothing to obtain a service station lease,[40] would anyone pay another lessee $160,000 for the privilege of working 12-17 hours per day as the operator of a Union station, with the prospect of getting out of it less than he could earn as wages, or, indeed, no matter what the prospective operator thought he might earn? The answer is plainly "no."

3. THE VERDICT COULD NOT BE SUPPORTED ON ANY ALTERNATIVE THEORY.

All that happened when Union declined to give Simpson another lease was that Simpson was no longer able to follow his then occupation on a particular street corner. He suffered no physical impairment, loss of life expectancy, or business acumen. He could move to another station with no loss of earnings, *and he did.* He could change trades, and he did. As this Court noted in *Standard Oil Company v. Moore,* 251 F.2d 188, 220, n. 44 (9 Cir. 1957), *cert. den.* 356 U.S. 975:

> "Moore retains his life expectancy and business acumen. . . . he can, at least theoretically, do as well with it as he could have done by continuing in business at his Fourth Avenue South location."

Here we need indulge in no speculation about what Simpson could "theoretically" do elsewhere. We *know* that he went to a

---

39. Union's instructions based on the *Moore* case (54 A-D, 1 R. 216-219) were refused and the failure to give them excepted to (R. 1655). Thus the jury was permitted to engage in the sophisticated task of valuing a business without the key guidelines for doing so. This alone would warrant granting a new trial.

40. Simpson's total outlay to enter the station was $3,700, with which he obtained the necessary equipment and inventory. (R. 627-629).

Mobil station where he made more than he did at the Union station. *In short, appellant was not damaged at all by leaving the Union station.* Leaving was, instead, an economic benefit to him.

It is doubtless for this reason that appellant has never urged a loss of income theory. The destruction of a business has been likened to "an ordinary tort claim for a broken arm", *Flintkote Co. v. Lysfjord,* 246 F.2d 368, 396 (9 Cir. 1957) *cert. den.* 355 U.S. 835, and the rule of damages in "an ordinary tort claim for a broken arm" is succinctly stated in *Conte v. Flota Mercante Del Estado,* 277 F.2d 664, 669 (2 Cir. 1960):

> "The general principle is easily stated. The objective is to place the libelant in the same economic position as would have been his if the injury had not occurred. We seek to accomplish this goal by a formula which, stated in an oversimplified form, consists of determining what libelant's annual earning power would have been but for the injury, *deducting what it will be thereafter,* multiplying the result by libelant's life expectancy, and discounting the product to present value."

The verdict of $160,000 represents the present discounted value of about $10,500 per year over a 24-year period.[41] As appellant's earning power exceeded $5,000 per year after leaving the Union station,[42] he could suffer an annual loss of income equalling $10,500 only if the Union station could produce over $15,500 annually to Simpson. There is, of course, no evidence that *any* dealer, at *any* time earned $15,500 per year at *this* Union station, at *any* Union station, or at *any* service station of any brand. Simpson himself, at a Mobil station which averaged over 15,000 gallons per month (D. Ex. L), a figure substantially in excess of

41. Plaintiff's Exhibit 68 contains the annuity factor of 15.246963 for a 24-year period. Dividing that factor into $160,000 yields approximately $10,500 per year.

42. Union's requested instruction 54 Revised (1 R. 220) would have told the jury that they were required to consider Simpson's earning power in other occupations. This instruction was refused and the refusal excepted to (R. 1655). As a result, the case was converted into what amounted to a personal injury case in which plaintiff was assumed to have been totally incapacitated.

the average gallonage at the Union station under everybody's operation during its entire existence (D. Ex. L), was able to earn only an average of $468.61 per month (D. Ex. K, p. 2), or some $5,600 per year.

The wildest speculation in the entire record is Professor Paglin's guess that *if* the Union station sold 25,000 gallons per month, *if* a 6¢ "net margin" (i.e., margin after deducting rent) was obtained for each gallon, and *if* a "normal" increase in the sales of tires, batteries, etc. were achieved, the station would yield about $13,200 per year. (R. 769). But there was never a single year when the station averaged 25,000 gallons per month; instead it averaged, over an 11-year period, barely more than half of that. (D. Ex. J). There is no evidence that any dealer in Fresno ever averaged 6¢ "net margin" per gallon; instead, the evidence is that Simpson averaged 5.59¢ per gallon as a Union dealer and 4.58¢ as a Mobil dealer (D. Ex. M), and that retail prices in Simpson's area could fall so low that Simpson himself believed it necessary to sell at prices which yielded him only 2.6¢ per gallon "net margin." (R. 882). And, of course, the evidence demonstrates that any computation premised on a 24-year basis is pure fiction.

4. FACTORS OTHER THAN EXCESSIVENESS REQUIRING A NEW TRIAL.

The fantastic size of the verdict, standing alone, was ample ground for granting a new trial. But the trial court had before it many factors in addition to the grossness of the verdict.

It was patent, for example, from a note sent by the jury during its deliberations and the subsequent colloquy between the Court and the foreman (R. 1660-1668) that the jury was totally confused about what it was supposed to determine. Its later verdict cast light on the significance of the episode as indicating that the jury was adding sums to cover income taxes, attorneys' fees and costs (R. 1803-4).[43] In addition, as previously noted (supra, pp.

43. In the foreman's words (R. 1662):
"Well, we are asking is that what the plaintiff is going to get. . . . We want to start with the gross and deduct costs and so forth and end up with a net to the plaintiff."

75, 76), defendant's requested instructions stating the guidelines for measuring the value of a business, and those dealing with offsetting Simpson's earning power, were not given, with the result that case went to the jury in the posture of a wrongful death action.

Nor was this all. From beginning to end the case was presented by Simpson's counsel in a manner calculated to inflame and mislead the jury. Simpson was painted as the valiant war hero (E.g., R. 227, 552-553, 754) who had been wronged by the "big corporation".[43] "Damage" figures utterly without support in the evidence were written on the blackboard by appellant's counsel (R. 765-767), and prejudicial statements wholly outside the record were made in closing argument by appellant's counsel, despite the admonition of the Court. (R. 1608-1609; 1616-1618). Considering the case as a whole and the manner of its presentation, the trial court concluded that there had been a miscarriage of justice. We submit that this was "entirely within the discretion of the trial judge" (*Moist Cold Refrigeration Co. v. Lou Johnson, supra,* 294 F.2d at 256), and that there is no basis on which this Court could determine that that discretion was abused.

C. The Jurors' Affidavits Played No Part in the Trial Court's Determination.

After the jury had been discharged, counsel for appellee interviewed jurors Grignon, Smith and Price and filed the declaration of one (2 R. 345) and the affidavits of the other two (2 R. 347, 357) respecting the manner in which this extraordinary verdict was reached. Appellant urges that it was error for the trial court to "consider" or "countenance" these jurors' statements or to rule

44. E.g., the opening statement of Simpson's counsel (R. 230):

"Now, it [Union Oil] is a company that is vast, has some subsidiaries you never hear about, that are wholly owned by the Union Oil Company, probably a billion-dollar company. Lord knows what its assets are; maybe they will tell us during the trial how big their assets are. The evidence will probably be in the hundreds of millions, up into the billion area. It's big, it's a big corporation."

on the motion for new trial with the affidavits before it.[45] (App. Op. Br. 58-60).

The complete answer is that *the trial court did not consider these jurors' statements in making his ruling.* In his own words, on granting the motion for new trial (R. 1803):

> "My reasons for this have nothing to do, or have I considered in any way at all, with the affidavits of jurors that have been filed herein."

Long before there was a verdict, the trial judge had expressed his concern with the "horribly speculative" nature of the damage evidence. (R. 842). And for the trial court's reaction immediately after the verdict and before there were any jurors' affidavits, one needs only read the trial judge's own statement (R. 1803-1804):

> "After the verdict was returned and I left this courtroom I was shocked with it just as I am now. There was more speculation, guesswork and conjecture in making up the sum of $160,000 than I have ever experienced with a jury and a return of a jury verdict—the question which took place in the courtroom with the jurors during this deliberation I think illustrates, to one point of view, at least, that this jury considered the situation to be such that—regardless of the affidavits and we don't have to consider them—they certainly had things in mind that they were not instructed that they could consider in any manner or means and in which they were not told that they were elements of damage in any way for this consideration."

In the face of these statements by the trial court, appellant brazenly asserts that the trial judge was nevertheless "unconsciously influenced" by the jurors' statements (App. Op. Br. 63) because the judgment notes that the verdict may have resulted from consideration by the jury of irrelevant factors. (2 R. 550). But the remarks of the trial court just quoted make plain that the

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45. Appellant also assails the ethics of appellee's counsel in talking to these jurors after their discharge. (App. Op. Br. 63). As a matter of personal privilege we cannot permit this charge to go unanswered, but, as it is peripheral to the matters before the Court, we reply to the claim in Appendix II.

irrelevant factors were disclosed to him not by the affidavits—"we don't have to consider them"—but by the note from the jury to the court during the jury's deliberation and from the subsequent colloquy with the foreman (R. 1660-1663).

CONCLUSION

We respectfully submit that there is no merit in the appeal and that this Court should affirm.

Dated: June 14, 1968.

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Union Oil Company of California

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19, and 30 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

Moses Lasky

(Appendix Follows)

Appendix I

THE PSEUDO QUESTION (p. 10 supra): The District Court Foreclosed No Issues Properly in the Case

On the first appeal, *Simpson v. Union Oil Company,* 311 F.2d 764 (1963), this Court observed that "to say the least, plaintiff's contentions vacillated" (p. 767), that on one day his counsel would disavow a contention and then on another reassert it, all resulting in an unsatisfactory record. The attempt to raise the pseudo-question is another example of this proclivity of counsel. By implication this Court admonished the District Court to be more assiduous in fixing issues, and this time the District Court was.

Plaintiff sought to inject the issues of "attempt to monopolize" and "tie-in" into this case on May 31, 1966, by a proposed amendment to his prior definitive pre-trial statement (1 R. 103). This was 8 years after the case had commenced and 2 years after it had been remanded by the Supreme Court. The case had already been pre-tried at length, not once but twice. A first series of protracted pre-trial conferences had taken place before Judge Burke in 1959 and 1960.* After remand from the Supreme Court, three pre-trial hearings had been held before Chief Judge Harris.† At the beginning of the case, in June 1958, Judge Harris, on a motion for preliminary injunction, summarized the case as follows (*Simpson v. Union Oil Company of California,* 162 F.Supp. 746, 747):

> "The substance of plaintiff's complaint is that defendant, acting under a consignment agreement for the disposition of gasoline products, has sought to fix retail prices. When plaintiff, in order to meet competition, refused to comply with defendant's price schedule, he was informed that he would not have his lease renewed."

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*The transcript of oral proceedings before Judge Burke totals 367 pages.

†Occupying 110 pages of transcript.

From that early date plaintiff's claim involved two issues and two only: (1) whether the contract between the parties constituted unlawful price fixing; and (2) if so, whether plaintiff suffered damages by reason thereof. Two and a half years later, in December 1960, after the extensive proceedings before him, Judge Burke filed a Memorandum and Order which detailed the claims of the parties in accord with what Judge Harris had epitomized before. Noting counsel's vacillations, Judge Burke stated that, nevertheless:

> "Extensive pre-trial proceedings before this court have eliminated all the factual disputes . . . [First R. 347]
>
> * * *
>
> "The fundamental issue in the instant action is the legality of Union's method of marketing gasoline by use of retail dealer consignment agreements. [First R. 349]
>
> * * *
>
> "However, the record indicates that plaintiff's case rests solely on the contention that the retail dealer consignment agreement as such, violates the Sherman Act." (First R. 350)

Although Judge Burke's dismissal of the case was reversed by the Supreme Court, not only was his definition of the issues not disturbed, but it was reasserted by plaintiff after the remand. When, after the remand, Union sought a pre-trial conference, plaintiff denied that there was any need for one (R. 9, 12, 15) and asked, instead, for an early trial date. To this end, on January 25, 1965, he filed a motion for a special trial setting and on April 14, 1965 he filed a motion to advance (1 R. 578). Then on August 24, 1965, he filed a document entitled "Plaintiff's Pre-Trial Statement" (1 R. 5-11), and he demanded that defendant be ordered to file its definitive trial statement (R. 15, 16, 30, 41). Defendant was so ordered (R. 30) and did so (1 R. 26). In plaintiff's "Pre-Trial Statement" of August 24, 1965, he stated the issues and his claim, just as had Judge Harris and Judge Burke, as turning on defendant's consignment system. This Pre-Trial Statement stated (1 R. 7, line 30, et seq.):

> "By reason of the mandate of the United States Supreme Court dated May 25, 1964, plaintiff believes the only remaining issue of fact to be tried and proved by the plaintiff is the amount of damages suffered by the plaintiff."

The nature and cause of these damages were set forth as follows (1 R. 6, line 16 et seq.):

> "Mr. Simpson signed the one-year lease and Retail Dealer Consignment Agreement, effective May, 1956. For some time he abided by the price orders of defendant pursuant to this Agreement, and in 1957 he determined to fix his own prices. On or about March, 1958, plaintiff lowered his retail price to 27.9¢ per gallon. He was ordered to set it at 29.9¢ per gallon. Mr. Simpson insisted that he had the right to fix the retail price, and defendant informed plaintiff that unless he fixed his price as ordered by the Union Oil Company, his lease would not be renewed in May, 1958. Mr. Simpson persisted in setting a competitive price *and his lease was not renewed for this reason.*"

This "pre-trial statement" of 18 pages, with exhibits, contained *not a word* about "attempts to monopolize" or about "tying arrangements". Not only were the issues which plaintiff sought to thrust into the case in May 1966 complex and foreign to what had gone before, but they had absolutely nothing to do with his claims of damage. His claims in that respect always have been two. First, he maintained that because of the consignment agreement, he was "unable" to set his own prices for gasoline, thereby being damaged in the sum of $1,000. This theory, with computations allegedly supporting it, appears in Plaintiff's Pre Trial Statement of August 24, 1965 with the statement:

> "the Retail Dealer Consignment Agreement Program did not allow plaintiff to obtain 6¢ per gallon of gasoline sold margin, with resulting loss thereby." (1 R. 8, lines 27-30)

Plaintiff's second claim of damage, as set forth in that Pre-Trial Statement was premised on the fact that he was not given a further lease and, at plaintiff's urging and to focus the issues, the

parties stipulated that plaintiff was not given a further lease because he would not comply with the terms of the consignment agreement. (See p. 3, supra of this brief).

In the course of 8 years of litigation, concessions were made, and stipulations were given, all to facilitate sharpening the issues. What plaintiff sought to do by his purported "amendments" was to wash down the drain these 8 years of accomplishments of counsel and of three tiers of courts in framing the issues, and to wander at large through an entire catalogue of supposed antitrust violations. To permit it would have aborted the entire purpose of pre-trial.

It would be idle to wander through the discursive complaint to find the issues. 3 Moore's Federal Practice, § 16.11, p. 1115 (1964) cogently states the function of the pretrial conference as being to "crystallize the issues". A party's pretrial statement is binding on him. Stipulations reached and statements made at pretrial conferences are binding unless modified upon leave of court. *United States v. Tampa Bay Garden Apartments, Inc.,* 294 F.2d 598, 606 (5 Cir. 1961); *Laird v. Air Carrier Engine Service,* 263 F.2d 948, 953 (5 Cir. 1959). Parties are to be confined to the issues made by their pretrial statements. *Payne v. S. S. Nabob,* 302 F.2d 803, 806 (3 Cir. 1962), cert. den. 371 U.S. 870; *Valdesa Compania Naviera v. Frota Nacional de Petroleiros,* 348 F.2d 33, 37, 38 (3 Cir. 1965). In *Life Music, Inc. v. Broadcast Music, Inc.,* 31 F.R.D. 3 (S.D. N.Y. 1962), another treble damage antitrust action in which there had been numerous pretrial conferences over the years, the Court said

> "I have no doubt that the court has the power and the authority to define the issues where counsel have failed to agree as to what are the triable issues . . . ." (p. 6)
>
> * * *
>
> "To deny existence of the court's authority to define the issues where counsel fail to agree would make a mockery of all the extensive pre-trial procedures which courts have devised in an effort to reduce, as far as possible, the danger of chaos inherent in every protracted and complicated case." (p. 8)

* * *

> "These proposed additions are yet another attempt to broaden rather than define the issues. It may no longer be done at this stage of the proceedings." (p. 17)

When by its final Pretrial Order, (1 R. 123) the District Court defined the issues to be tried with precision, it held that plaintiff could present everything asserted in his Pre-Trial Statement, viz.:

> "1. The issues to be tried are those set out in Plaintiff's Pre Trial Statement filed August 24, 1965, and the Pretrial Statement of Defendant Union Oil Company of California filed November 30, 1965" (1 R. 124),

and that the issues plaintiff sought to inject by amendment

> "(a) are outside the issues of this case as said issues have been crystallized over a period of eight years of litigation between the parties;
>
> "(b) would, if permitted now to be injected in the case, constitute a complete change of plaintiff's theory, which change is sought by plaintiff solely because of plaintiff's dissatisfaction with the Court's ruling set forth in paragraph 2 above, [i.e., on the equity issue] and would greatly increase the complexity of the case and protract the trial." (1 R. 125)

By that order the court acted well within its powers and discretion.

Appendix II

There Was Nothing Unethical or Improper in Interviewing Jurors in This Case After They Had Been Discharged.

Throughout the United States, and in California (CCP § 657 (2)), there are statutes which expressly authorize the use of jurors' affidavits on motion for new trial, and whatever evidence is admissible in the State courts is admissible in the federal courts. R.C.P. Rule 43(a). Even in the absence of statute, the authorities recognize that, in various circumstances, it is proper to receive such affidavits. E.g., *United States v. Beach,* 296 F.2d 153 (4 Cir. 1961); *Southern Pac. Co. v. Klinge,* 65 F.2d 85 (10 Cir. 1933), cert. den. 290 U.S. 657; *Aetna Life Ins. Co. v. Lindsay,* 69 F.2d 627 (7 Cir. 1934). Although it is probably impossible to reconcile the decisions respecting what those circumstances are, no one can deny that such circumstances exist. From these indisputable facts, it immediately follows that no blanket prohibition of interviewing jurors after discharge can be supported.

Appellant quotes (App. Op. Br. 59) Judge Fee's extraordinary statement in *Northern Pacific Railway Company v. Mely,* 219 F.2d 199 (9 Cir. 1954). We say "extraordinary", because only a year earlier the Court approved the propriety of establishing facts "by submitting affidavits of the jurors themselves". *Remmer v. United States,* 205 F.2d 277, 292 (9 Cir. 1953), rev'd on other grounds 347 U.S. 227. In any event, within two years of the *Mely* opinion, the Court withdrew from the extreme position there stated and wrote, in *Bryson v. United States,* 238 F.2d 657, 665 (9 Cir. 1956), cert. den. 355 U.S. 817:

> "Although interrogation of jurors may be prohibited as a general rule, it is permitted when there is some indication that grounds for impeachment of their verdict may be disclosed thereby."

More recently, the Court had before it *In re Sawyer,* 260 F.2d 189 (9 Cir. 1958), a disciplinary proceeding brought against a lawyer and including, as one charge, interviewing a juror after verdict. Without discussion of the point under consideration, the Court affirmed a disciplinary order. Judges Pope and Hamley dissented.

After quoting the language of *McDonald v. Pless,* 238 U.S. 264, 268 "that it would not be safe to lay down any inflexible rule" respecting juror's evidence "because there might be instances in which such testimony of the juror could not be excluded without 'violating the plainest principles of justice'," and citing *Mattox v. United States,* 146 U.S. 140, as "an instance in which the court held that affidavits of jurors were properly used to show overt acts in the jury room which are accessible to the knowledge of all the jurors", Judge Pope's opinion continues (260 F.2d at 231):

> "Since jurors' affidavits may thus be used on motions for a new trial, a lawyer may *of course* interview the juror for the purpose of procuring the facts and the affidavits; *otherwise they would be unobtainable.*"

Although it was undisputed that counsel had repeatedly interviewed a juror, the Supreme Court reversed the disciplinary order. *In re Sawyer,* 360 U.S. 622 (1959).

The Code of Trial Conduct of the American College of Trial Lawyers (1965-1966) provides (para. 19(b)):

> "Subject to any limitations imposed by law it is the lawyer's right, after the jury has been discharged, to interview the jurors to determine whether their verdict is subject to any legal challenge. The scope of the interview should be restricted and caution should be used to avoid any embarrassment to any juror or to influence his action in any subsequent jury service."

A line of recent decisions demonstrates this to be a correct statement. Mr. Justice Holmes wrote in *Patterson v. Colorado,* 205 U.S. 454, 462 (1906):

> "The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print."

This very statement is quoted in *Sheppard v. Maxwell,* 384 U.S. 333, 351 (1966), and there styled the "undeviating rule" of the Supreme Court, while in *Turner v. Louisiana,* 379 U.S. 466, 472 (1965), the Court states:

> "The requirement that a jury's verdict 'must be based upon the evidence developed at the trial' goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury."

This was followed by *Parker v. Gladden,* 385 U.S. 363 (1966), reversing a conviction on the basis of comments made to jurors.

If these principles are to be more than theoretical pronouncements, there must be a way to bring evidence of jurors' conduct before the trial court. That jurors' affidavits are proper for such purposes is obvious from *United States v. McMann,* 373 F.2d 759 (1967). There, the New York Court of Appeals had refused to consider such affidavits on the theory that they could not be used to impeach a verdict. On *habeas corpus,* the cause was remanded to the State courts for further consideration in the light of *Parker v. Gladden, supra.*

A recent discussion by this Court of jurors' affidavits is found in *Evalt v. United States,* 359 F.2d 534 (9 Cir. 1966). There, it was urged that counsel's improper argument to the jury had been prejudicial, and the affidavits of two jurors were offered, each of which stated that if the juror had known a certain fact, he would have voted differently. Without passing on the admissibility of the affidavits, *and without even a suggestion that obtaining them was unethical,* the Court recognized that the affidavits showed that the claim of prejudice was not imaginary. It said (359 F.2d at 546, n. 15):

> "We do not here pass upon the vexed question as to whether affidavits of jurors may be received to impeach the verdict. [Many citations including the *Mely* case cited by appellant.] Under most of the foregoing cases, the affidavits would probably be both inadmissible and insufficient to impeach the verdict if admitted. We cite them only as illustrating that our view as to the prejudicial nature of what happened here is by no means a figment of the oversensitive imagination of those who inhabit the ivory tower of the appellate bench. Further confirmation is found in that portion of the record that relates to the first trial, at which the

> jury was unable to agree. They sent notes to the judge, during their deliberations, asking the following questions: 'Can jury give verdict of guilty with recommendation of psychiatric treatment? Can jury give verdict of not guilty with recommendation that defendant be committed to mental institution?' "

The parallel between *Evalt* and the instant case is striking. Whether the juror's affidavits in this case were either admissible or sufficient to "impeach" the verdict is beside the point, because the trial court disregarded them. But the jury's note, the colloquy which followed between the trial court and the foreman, and the fantastic amount of the verdict fully warranted interview of the jurors after discharge.

No. 22,148

IN THE

United States Court of Appeals
For the Ninth Circuit

RICHARD S. SIMPSON, *Appellant,* vs. UNION OIL COMPANY OF CALIFORNIA, *Appellee.*	}

Appeal from the United States District Court
for the Northern District of California

APPELLANT'S REPLY BRIEF

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Subject Index

Table of Authorities Cited

Cases

Codes

Constitutions

Rules

Statutes

Texts

No. 22,148

IN THE

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RICHARD S. SIMPSON, *Appellant*, vs. UNION OIL COMPANY OF CALIFORNIA, *Appellee.*	

Appeal from the United States District Court for the Northern District of California

APPELLANT'S REPLY BRIEF

I. THE SUPREME COURT'S MANDATE ALLOWED PETITIONER SIMPSON TO OBTAIN A JUDGMENT FOR DAMAGES AGAINST UNION OIL COMPANY WITHOUT REGARD TO THE QUESTION OF PROSPECTIVITY.

A. A supplier's coercion of a dealer's retail price had been declared unlawful before Simpson, regardless of the coercive device used.

The contentions of the appellee and the ruling of the trial court below are premised upon an unsupportable contention that the Supreme Court announced a new rule in its holding in *Simpson v. Union Oil Co. of California,* 377 U.S. 13. At no time did the Supreme Court indicate that its holding constituted a new rule. The Supreme Court's opinion in *Simpson* involves the following rulings:

1. The reiteration of the law that the coercive fixing of retail prices is unlawful regardless of what the coercive device is, *United States v. Parke-Davis & Co.,* 362 U.S. 29 (1960), explaining *United States v. Colgate & Co.,* 250 U.S. 300 (1919). 377 U.S. at 17.

2. The Sherman Act does not tolerate agreements requiring the maintenance of resale prices, whether in the form of consignment or otherwise. Id. at 24.

3. A major oil company which has lease arrangements with thousands of independent dealers may not impose non-competitive prices on these thousands of persons who might otherwise be competitive.

4. By reason of the lease and consignment agreement, dealers are coercively laced into an arrangement under which Union is able to impose non-competitive prices on thousands of dealers who otherwise might be competitive. Id. at 21.

5. Addressing itself to the defense of the Union Oil Company that the *General Electric* case sustained the validity of the Retail Dealers' Consignment Agreement Program, the Supreme Court held that the case involved patents, which, under constitutional and congressional authority, permit a manufacturer to license the patented article upon terms which in substance or effect allow it a royalty payment. The *General Electric* case did not involve distribution of unpatented articles.

The mandate of the Supreme Court was therefore as follows:

1. Union Oil Company violated the antitrust laws, for there was an agreement for resale price maintenance, coercively employed.

2. Simpson suffered actionable wrong or damage.

3. Simpson's case was remanded for trial on all other issues in the case and the damages, if any, suffered.

4. Whether or not the *Simpson* rule as applied to non-coercive price fixing which utilized a bona fide consignment agreement was to be applied prospectively was reserved. As to this ruling, appellant contends that the Supreme Court most certainly did not authorize a show-

ing of equities warranting prospective application of this extension to Union Oil or to those who have used coercion in maintaining resale prices.

The antitrust laws have long declared unlawful the use of coercion to control an independent dealer's retail prices. *Federal Trade Commission v. Beech-Nut Packing Co.*, 257 U.S. 441 (1922). General Electric did not involve facts showing the coercive employment of agency price-fixing agreements. *Beech-Nut*, supra, *General Motors*,[1] *American Tobacco*,[2] *Richfield*[3] and *Parke-Davis*,[4] however, made it crystal clear that suppliers had no dispensation under the Sherman Act to compel obedience to price orders on fear of destruction of a dealer's entire business. Further, it has long been held that a supplier could not threaten a dealer with loss of supplies or his business unless he conformed to supplier's demands or retail prices. Liability under the antitrust laws follows the cancellation or loss of supplies if the dealer did not accede to the threats. *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359 (1927); *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U.S. 211 (1951); *Emich Motors v. General Motors Corp.*, 340 U.S. 558 (1951). Further, the Supreme Court has reiterated in *Perma-Life Mufflers, Inc. v. International Parts Corp.*, 5 Trade Reg. Rep. ¶ 72,486 (June 10, 1968), that threats from suppliers stemming from the dealers' complaint against the restrictive policies of the suppliers was evidence of a coercive program. Id. at 85,590.

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[1] *United States v. General Motors Corp.*, 121 F.2d 376 (7th Cir. 1941).

[2] *American Tobacco Co. v. United States*, 147 F.2d 93 at 113 (6th Cir. 1944), *aff'd* 328 U.S. 781 (1946).

[3] *United States v. Richfield Oil Corp.*, 99 F. Supp. 280 (S.D. Cal. 1951), *aff'd* 343 U.S. 922 (1952).

[4] *United States v. Parke-Davis & Co.*, 362 U.S. 29 (1960).

B. Appellant's constitutional objections are not frivolous.[5]

Great Northern Ry. Co. v. Sunburst Oil & Ref. Co., 287 U.S. 358 (1932), did not raise the contention of this appeal that, because of Simpson's federal rights guaranteed by the Sherman and Clayton Acts, the federal judiciary is without power to refuse to give Simpson his federal remedy under the doctrine of prospectivity. The *Sunburst* case rather involved the ability of a state court under the Fourteenth Amendment to determine whether or not its decisions would be prospective. As was pointed out in Appellant's Opening Brief, *Linkletter v. Walker,* 381 U.S. 618 (1965), involved federal judicial policy in the criminal law field. *Linkletter* did not involve the denial of a federal statutory remedy. (*Hanover Shoe v. United Shoe Mach. Corp.,* 5 TRADE REG. REP. ¶ 72,490 (June 17, 1968), however, is now more instructive in Sherman Act litigation than *Linkletter. Hanover Shoe* is discussed by appellant at section C, 2 p. 7, infra.)

The constitutional issue involved in this appeal is whether or not, under the doctrine of separation of powers and the Fifth and Seventh Amendments, the federal courts have power to deprive a litigant of his remedy under federal statute. *Brinkerhoff-Faris Trust & Savings Co. v. Hill,* 281 U.S. 673 (1929).

Appellee's discussion of retroactivity under heading I, B deals there with the broader issue of whether or not there is any constitutional objection to a Court's decision to apply a reversal prospectively when the party is not seeking enforcement of a federal remedial statute. Even in that field, it is the general rule that overruling deci-

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[5]Appellee claims appellant has waived his constitutional arguments. But appellant is not urging the unconstitutionality of a statute as was the case in *Williamson v. Weyerhaeuser Timber Co.,* 221 F.2d 5 (9th Cir. 1955). The federal appellate courts will hear arguments concerning the deprivation of federal rights even though raised for the first time on appeal. *United Bhd. of Carpenters v. United States,* 330 U.S. 395, 411 n. 24, 412 n. 25 (1947).

sions will always be retroactively applied in matters involving general mercantile law. 14 Am. Jur. *Courts* § 130 (1938). The exception to the general rule of retroactivity applies only to contract cases or cases involving vested property interests. *Gelpcke v. City of Dubuque*, 68 U.S. (1 Wall.) 175 (1863).

Appellee states that "It is obvious that what induced the Supreme Court to bring up the *Simpson* case for its attention was not any concern whether a particular man named Simpson should recover damages from a particular company named Union Oil, but a desire to rule on consignment merchandising in the economy of the United States." (Brief for Appellee at 24.) That sentence is contradicted by the universal rule that the Supreme Court does not decide questions which do not involve cases or controversies between parties. *Trail-Mobil Co. v. Whirls*, 331 U.S. 40 (1947); *United Pub. Workers v. Mitchell*, 330 U.S. 75 (1947); *St. Pierre v. United States*, 319 U.S. 41 (1943). Simpson's right to recover against Union Oil is a matter of federal legislative prerogative and the courts are without authority to interfere with the legislative scheme.

A constitutional right to jury trial is involved in the trial court's determination to refuse to enforce the jury verdict.

The ability of a federal court in a jury trial to determine issues of fact is also involved in this appeal. Appellee claims that appellant has waived the jury trial argument. Appellant, however, all through the pretrial stages, urged that the *Simpson* decision precluded any equity determination, whether by court or by jury. At the pretrial conferences, after an adverse decision on that contention, plaintiff's counsel urged that Simpson's right to recovery of damages should be separated from the equity defense (Tr. 117-119). It was the position of plaintiff's counsel that the jury should determine the damages, if any,

suffered, and that the matter of the "equities" be, at the most, simply a matter of opening the record to the defendant for the Supreme Court's consideration. The court ruled against plaintiff. It did not view the equity defense as a matter of completion of the record, but as grounds for dismissing plaintiff's complaint. This was opposed by appellant. Thus, there is a fundamental issue here; whether or not the federal judicial system contemplates a federal court, based upon its findings of fact, to dismiss a jury verdict. Appellant urges that the Seventh Amendment prevents such action. *Beacon Theatres, Inc. v. Westover,* 359 U.S. 500 (1959).

C. Union Oil cannot validly argue that there would be any unfairness to it by enforcing the judgment below.

1. Introduction.

The premise of Union Oil Company that it is unfair to apply a rule dated April 20, 1964, to facts arising in 1956 to 1958 is preposterous, since the decision applied to the facts which plaintiff below put into issue, and which Union Oil contested. Union Oil asserted the validity of its Retail Dealer Consignment Agreement Program to Mr. Simpson. It determined to oust Mr. Simpson from the service station pending the appeal, despite the long line of cases authorizing treble damages by ousted or cancelled dealers. See cases cited supra, at p. 3. Mr. Simpson was obviously to be a conspicuous example to errant dealers. Had Union Oil not been so lawless and punitive, it could have allowed Mr. Simpson to stay on the premises pending the appeal. It instead adopted a bold, ruthless and predatory method of disposing of Mr. Simpson, which raised a claim of the violation of his federal rights. Having adopted such a course of conduct, there can be no argument of fairness. Union Oil cites the damage figures found by the jury in terms of its investment powers, attempting to persuade the Court that it has been unfairly adjudged. What it ignores, of course, is that Union pro-

mulgated an *unlawful* program and enforced it during the period 1955 through 1964. This control of retail prices was made at the expense of Mr. Simpson and all dealers who were the victims of this unlawful program, as well as the general public. There is the encouraging of lawlessness in not requiring Union Oil to disgorge these illegal fruits to those it has injured and attempted to ruin. *Perma-Life Mufflers, Inc. v. International Parts Corp.*, supra. It is a matter of Congressional will.

2. Union's recitation of the important factors determining whether a new rule should be applied prospectively is deficient under Hanover Shoe.

The factors set forth by Union Oil which relate to the general doctrine of prospectivity have been shown by the Supreme Court to be incomplete. Union Oil asserts that the determining factors are (a) reliance on the General Electric doctrine, and (b) the purpose sought to be served by replacing the old rule by a new one.

In *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 5 Trade Reg. Rep. ¶ 72,490 (June 17, 1968), the Supreme Court held that the appellate court erred in applying prospectively prior antitrust decisions in the favor of the defendant there. In this case the Third Circuit had ruled that the *Alcoa-American Tobacco* rule[6] represented a new departure in antitrust laws under which the plaintiff need not prove the actual exclusion of competition in order to show a violation of Section 2 of the Sherman Act. Based upon that interpretation of the Rule, the Third Circuit adopted the argument of defense counsel and disallowed damages to Hanover Shoe based upon United Shoe's violation of Section 2 prior to 1946. It was reversed by the Supreme Court.

The Supreme Court did not pass upon the question of whether or not there could ever be prospective application

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[6] *American Tobacco Co. v. United States*, 328 U.S. 781 (1946).

of its overruling decision, since it held that the Court of Appeals incorrectly interpreted the *American Tobacco* opinion as being novel and innovative. In its analysis of the issue the Supreme Court stated that the defense to liability under the Sherman Act because of reliance upon prior law could not even be raised unless (1) there was a clearly declared judicial doctrine, (2) upon which a defendant relied and (3) under which its conduct was lawful, (4) a doctrine which was overruled (5) in favor of a new rule according to which conduct performed in reliance upon the old rule would have been unlawful. Id. at 85,622. Appellant asserts that under the tests laid down in *Hanover Shoe,* Union Oil can fare no better than did United Shoe.

The plain fact of the matter is that Union is attempting to avoid the fact that its retail dealer consignment agreement program was coercive. *Federal Trade Commission v. Beech-Nut Packing Co.,* 257 U. S. 441 (1922). It is relying, therefore, only upon the slender reed that *General Electric* allowed the distribution of patented articles pursuant to agency agreements which contained price-fixing clauses. There has never been (and there can never be under the history and purposes of the Sherman Act) clearly declared judicial doctrine which allows agency agreements to be used coercively, or which sanctions a scheme or program by which independent dealers are threatened with lease ouster unless prices are agreed to. As heretofore shown judicial doctrine was well established prohibiting coercive devices in order to control retail prices. The *General Electric* case simply did not involve coercive conduct. The record in the *Simpson* case showed a coercive price-fixing program. Had the program not been coercive, Mr. Simpson would still have his Union Oil service station business.

Even assuming General Electric established clearly declared judicial doctrines, there could be no justifiable re-

lance upon *General Electric* because of the developments in antitrust law and because the coercive features of the program were "left to marketing". Since *General Electric,* there were six lines of development which Union Oil's counsel were bound to know:

1. Horizontal and vertical price control is illegal per se. *United States v. Socony-Vacuum Oil Co.,* 310 U.S. 150 (1940).

2. Restraints of trade could not be cloaked by consignment or agency devises. *Standard Fashion Co. v. Magrane-Houston Co.,* 258 U.S. 346 (1922); *Dr. Miles Medical Co. v. John D. Park & Sons Co.,* 220 U.S. 373 (1911). Rather the rule announced in *United States v. Masonite,* 316 U.S. 265 (1942), was that liability was to rest, not on the skill with which counsel has manipulated the concepts of "sale" or "agency," but on the significance of the business practices in terms of restraint of trade. Id. at 280.

3. *General Electric* was directly attacked by the Department of Justice and remained as precedent for patented articles by a four to four split. *United States v. Line Material Co.,* 333 U.S. 287 (1948). Its applicability as a precedent under the Sherman Act was repudiated directly in *United States v. Masonite Corp.,* 316 U.S. 265 (1942), and in *United States v. United States Gypsum Co.,* 333 U.S. 364 (1948).

4. The Supreme Court made known a clear and fixed rule that service station dealers are independent businessmen whose businesses cannot lawfully be controlled by their landlord-suppliers' coercive acts. *Standard Oil & Standard Oil Stations, Inc. v. United States,* 337 U.S. 293 1949); *United States v. Richfield Oil Co.,* supra.

5. Companies holding sufficient economic power to impose an appreciable restraint on free competition were prevented from requiring a dealer to consent to agree-

ments which adversely affect free trade and commerce. *Northern Pac. Ry. Co. v. United States,* 356 U.S. 1 (1958); *Times-Picayune Publishing Co. v. United States,* 345 U.S. 594 (1953).

6. Refusals to deal cannot be utilized to enforce a resale price maintenance program which uses overt threats of refusal to deal as a means of coercion. *United States v. Parke-Davis & Co.,* supra; *United States v. Bausch & Lomb Optical Co.,* 321 U.S. 707 (1944); *Federal Trade Comm. v. Beech-Nut Packing Co.,* supra; *United States v. Colgate & Co.,* 250 U.S. 300 (1919).

Union Oil was bound to have knowledge of these lines of cases. Its counsel were grossly negligent in analysis of the retail dealer consignment agreement program if they advised Union without reference to these decisions. It is noted that Union Oil presented the court below with no written analysis of the lawfulness of its retail dealer consignment agreement program by its attorneys, although such memoranda were subpoenaed. (R. 513, Jan. 27, 1967, Tr. 1149.)

There is manifestly here a case in which Union Oil Company risked a predictable decision and a result which was sought by the House Subcommittee on Small Business, the Federal Trade Commission, and the Department of Justice.[7]

The cases cited by Union Oil Company do not support the proposition that it could employ coercion to fix the independent dealers' prices. *Lyons v. Westinghouse Elec. Corp.,* 235 F. Supp. 526 (S.D.N.Y. 1964), does not involve coercive employment of an agency agreement. The com-

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[7]The Department of Justice assumed the larger burden of proving that the Pacific States gasoline industry was embarked upon a conspiracy to monopolize and a conspiracy to restrain trade, part of which involved controlling retail prices of service station dealers. At no time did the Department of Justice state that Union's Retail Dealer Consignment Agreement Program was lawful. (Pl. Ex. No. 74.)

plaint in *Sun Oil Co. v. Federal Trade Comm.*, 350 F.2d 624 (7th Cir. 1965), put the oil industry on notice that the Federal Trade Commission was attacking consignment programs as coercive. *C.B.S. Business Equip. Corp. v. Underwood Corp.*, 240 F. Supp. 413 (S.D.N.Y. 1964), was a case in which the defendant claimed to hold or use patents. The decision involved a motion for summary judgment by the plaintiffs, which the court denied, noting, in part, that there were issues on the question of coercion. At 425, the Court stated:

> "There are additional issues that remain unsolved. Mr. Justice Douglas repeatedly refers to the 'coercive' type of agreement involved in Union Oil. The question of 'coercion' is contested between the parties to the Sales Agreement herein."

The cases cited by the defendant therefore support plaintiff's showing that there was no new rule involved in *Simpson* insofar as the Court centered its attention on the coercive aspects of the Retail Dealer Consignment Agreement program.

D. Simpson's own conduct was fully justified and in any event is immaterial to the issue of Union's liability to him.

Despite the fact that the Supreme Court had reversed the Ninth Circuit in ruling that Union Oil had a defense to liability based on Simpson's consent to the Consignment Agreement, defendant argued successfully below that Simpson's conduct was material to the issue of the "equities." So intent is Union Oil upon blackening the pot that it quotes Simpson's statement that he considered the Consignment Agreement "crap", a word specifically stricken by the court (Tr. 1690-1691). It is noted that the statement cited by Union shows that it knew Simpson's views as to the validity of the Consignment Agreement, yet Union charges fraud on Simpson's part. But the important consideration is that the Supreme Court has ruled that a plaintiff's moral reprehensibility is not

to be considered in private antitrust actions. The Supreme Court held that the purpose of the antitrust laws is best served by insuring that the law encourages the private plaintiff's suit, because of the overriding public policy in favor of competition.

In *Perma-Life Mufflers, Inc. v. International Parts Corp.*, supra, the Supreme Court stated, at 85,589-85,590, as follows:

> "Similarly, in *Simpson v. Union Oil Co.*, 377 U.S. 13 (1964), we held that a dealer whose consignment agreement was canceled for failure to adhere to a fixed resale price could bring suit under the antitrust laws even though by signing the agreement he had to that extent become a participant in the illegal, competition-destroying scheme. Both *Simpson* and *Kiefer-Stewart* were premised on a recognition that the purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws. The plaintiff who reaps the reward of treble damages may be no less morally reprehensible than the defendant, but the law encourages his suit to further the overriding public policy in favor of competition. A more fastidious regard for the relative moral worth of the parties would only result in seriously undermining the usefulness of the private action as a bulwark of antitrust enforcement. And permitting the plaintiff to recover a windfall gain does not encourage continued violations by those in his position since they remain fully subject to civil and criminal penalties for their own illegal conduct. *Kiefer-Stewart*, supra."

A further ruling in *Perma-Life* shows that the basic illegality here is that of Union's promulgating an illegal Retail Dealer Consignment Agreement, in coercing the dealers to use it, and in coercing the dealers to abide by its particular pricing orders. The purposes of the antitrust laws are flouted when the promulgator of such a

system is determined not liable to its victims. That issue is involved in this appeal.

E. The arguments of the appellant are not miscellaneous, and appellee uses that label because of their importance.

1. That the Supreme Court held that Union in its Retail Dealer Consignment Program employed coercive devices is decisive.

At pages 40-42 of his Opening Brief, appellant has listed the eight coercive aspects of Union Oil's Retail Dealer Consignment Program. That these factors are coercive is made plain in *Perma-Life Mufflers.* Union Oil told the dealers that it would do all in its power to compel them to follow consignment prices; that if the dealers did not follow Union Oil's prices they would not obtain a lease renewal. Union Oil even attempted to frighten the dealers into not filing suits testing the legality of its program. The Supreme Court in *Perma-Life* ruled, where evidence of the defendant's enforcement of an illegal system was present, that plaintiffs were not active participants in the illegal system.

Justice Fortas in a concurring opinion stated at 85,591 as follows:

> "But equality of position of this general nature is necessary before *in pari delicto* may apply to bar a remedy under antitrust. Unless the doctrine is so limited, the private remedy provided by the antitrust laws is nullified to a significant extent. The owner of a gas station may enter into an arrangement with the distributor and may benefit from its restrictive provisions. But this less-than-equal participation in the crime must not bar it from recovering in its own and the public interest if it can show that it has suffered compensable harm. Our decision in *Simpson* indicates this quite clearly. The antitrust laws are intended to protect individuals 'from combinations fashioned by others and offered to [them] . . . as the only feasible method by which [they] . . . may do business.' *Ring v. Spina,* 148 F.2d 647, 653 (1945)."

So it is that Union Oil Company does not come to grips with what it did during the period 1955-1958 to the dealers in insisting on control of the dealers' prices. It cannot do so because such factors demonstrate the basic point in this appeal which is that the Supreme Court held that the coercive employment of the Retail Dealer Consignment Agreement was violative of the antitrust law, and as such, there was no novel departure from existing antitrust doctrine.

2. Union's Consignment Agreement differed from that involved in General Electric.

Union argues the relationship between its consignment agreement and that of General Electric as if this were an open matter, but the Supreme Court has ruled on this issue. It ruled that the Consignment Agreement of Union Oil somewhat parallels the agency agreement used in the *General Electric* case. Union Oil argues that it did not require the consignee to cover the "stock", the gasoline, with insurance, but the Consignment Agreement specifically provided that the consignee "will indemnify and hold consignor harmless from liability, claims, or demands for damage to property occurring in connection with the conduct of his business" and will maintain adequate insurance against such liability (R. 97). Clearly, any theft or damage to gasoline was to be the responsibility of the consignee dealer. This is clearly so because paragraph 6 of the Consignment Agreement (R. 97-98) specifically holds the consignee liable for loss or damage other than earthquake, lightning, flood, fire, or explosion, not caused by his negligence, and will pay consignor for all gasoline sold, lost or damaged, at consignor's authorized retail prices then in effect (R. 97-98).

3. The cases cited by appellant are relevant.

In *Masonite*, the Supreme Court specifically referred to the *General Electric* case and gave its interpretation of

General Electric. The Court stated, 316 U.S. at 280:

> "In the General Electric case, the Court thought that the purpose and effect of the Marketing Plan was to secure to the patentee only a reward for his invention. We cannot argue that this is true here."

Clearly, defendant is not to be allowed to limit the warnings of *Masonite.* The Supreme Court did not say that *in horizontal conspiracy cases* the result must not turn on the skill with which counsel has manipulated the concepts of sales and agency agreements, but on the significance of the business practices in terms of restraint of trade. The Supreme Court stated, that *so far as the Sherman Act is concerned,* the result must not turn on such skill (316 U.S. at 280). Union's attorneys knew that the Sherman Act covered vertical restraint as well as horizontal restraint and that *Masonite* therefore was to be the guide in both horizontal and vertical price control programs under the Sherman Act.

Union takes issue with this Court's description of the Sun Oil litigation in *Simpson v. Union Oil Co.,* 311 F.2d 764, 769 n.6 (9th Cir. 1963). The Sun Oil complaint was filed November 8, 1957, five months before Simpson was ousted from his station. Thus, Union Oil Company was put on notice that coercive use of consignment agreements was subject to governmental attack under the Sherman Act, or under Section 5 of the Federal Trade Commission Act. The Federal Trade Commission complaints cited by this Court in *Simpson* show that the oil industry was on notice that governmental antitrust agencies were following the request of the House Subcommittee on Small Business to proceed against consignment agreements. Union Oil chose not to accede to the requests of the Subcommittee, but to contest the issues in court at Simpson's expense. It is in no position to complain of its liability to Simpson, having lost the issue.

4. **The Interim Report of the House Small Business Committee was involved with Consignment Programs.**

Union Oil claims that the report of this Committee of August 14, 1957 pertains or relates only to conspiracy charges. Such contention is unmeritorious. The House Subcommittee was manifestly urging investigation of consignment agreements, their use to control the dealers' prices and narrow their margin of profit. *Simpson v. Union Oil Co.,* supra, 377 U.S. at 19, n.5; see Pl. Ex. No. 80. Union Oil further contends in that section of its Brief that the Court in *United States v. Standard Oil Co.,* 1958 Trade Cas. ¶ 69,212 (1958), was fully informed as to Union's Retail Consignment Agreement Program; but Union Oil had taken the position, as is shown in Appellant's Opening Brief, not to disclose the mandatory nature of its price control programs. Justice Carter's description, in *United States v. Standard Oil Co.,* indicates that he was not informed that Union's Marketing policy was to oust errant dealers. Id. at 74,760. The statement of Judge Carter that, "We can assume that they would be free to operate on a buy or sell basis" indicates that the program was urged by Union as not being mandatory. *Simpson* proved otherwise.

Union Oil cites the statements of Mr. Greg Potvin in 26 A.B.A. Antitrust Section at 105 (1964). Union Oil does not cite Mr. Potvin's reference to the letter from Honorable William H. Orrick, Jr., Associate Attorney General in charge of the Antitrust Division to Chairman Roosevelt, stating in pertinent part,

> "We do not consider that the exception made in the decree with regard to consignment selling in any way immunizes the defendants bound by the judgment from an attack under the antitrust laws if a violation results from their engaging in consignment selling." Id. at 105-106.

Mr. Potvin further stated in 1964 that, "It does not presently appear that there is widespread conformance with the dictates of the *Simpson* case." Id. at 106.

II. DEFENDANT'S MOTION FOR A NEW TRIAL WAS IMPROPERLY GRANTED.

Appellee's arguments advanced here are in direct conflict with the Mandate of the Supreme Court in *Simpson*. They are in essence the arguments made to and adopted by the Honorable Lloyd H. Burke in the District Court's Memorandum and Order of December 30, 1960 (R. 358-359). The Supreme Court opinion held that Simpson suffered actionable damage and ordered a trial on this issue. The very law of the case precludes Union Oil Co. from reopening the matter.

Defendant's discussion of the facts further ignores entirely the case of *Lessig v. Tidewater Oil Co.*, 327 F.2d 459 (9th Cir. 1964). At 464, this Court stated,

> "Cancellation of Lessig's lease and contract in such circumstances would be unlawful, though in exercise of a right expressly granted Tidewater by the lease and contract. Lessig could claim compensation for the resulting loss, including reasonable anticipated future profits, and there was sufficient evidence from which the jury could find that such loss occurred."

Union argues that Simpson made no profits as a matter of law. This was a matter contained in Judge Burke's opinion appealed to the Supreme Court and closed by its mandate. It argues that Professor Paglin did not testify as to the value of appellant's business. The same basic contention (by the same counsel) was made in *Lessig* and was rejected. The exhibits prepared by Professor Paglin here specifically refer to the value of Simpson's Ventura Avenue Service Station. Pl. Ex. at 68A-D. It is clear that Dr. Paglin was offering a statistical analysis of what net profits would result at the service station business, based on the actual performance during the period of Simpson's occupancy, along with other factors (Tr. 758).

That a dealer spends many hours to build a clientele, and that Simpson's clientele were impressed by his busi-

ness ability, is seen by the evidence that 230 customers supported Simpson's staying at the service station (Pl. Ex. No. 48, Tr. 43). The purpose of damage law is to make the person as whole as he would be but for the proven violation. Here the defendant destroyed the plaintiff's business, and cannot be heard to argue that Simpson was not damaged at all by leaving the Union station. A Union Oil dealer can expect to obtain continued renewal of his leases as long as he abides by Union's policies (R. 441, 450-452). A person's right to a business generating income of over $10,000 a year cannot be so lightly treated. Union Oil destroyed Simpson's business and immutably altered the future course of his economic activities. That Union Oil dealers averaged 6¢ a gallon or more margin (after rent) before the consignment program was established by the testimony of Mr. Simpson (Tr. 644).

III. THE JUROR AFFIDAVITS SHOULD BE STRICKEN AND THEY PLAYED AN IMPROPER ROLE IN THE COURT'S GRANTING A NEW TRIAL.

Appendix II to Brief for Appellee attempts to support Union's lodging and filing of affidavits disclosing what occurred in the jury room by reference to the State of California Rule, C.C.P. §657(2). But this section refers to chance verdicts. The general rule in California is that affidavits (or declarations) of jurors may not be used to impeach verdicts even though they show coercion of a juror, evidence received out of court, discussion of the case with the bailiff, or independent investigation by some jurors. This is based on the policy of the desirability of stable verdicts and avoiding harassment of jurors. The only exceptions noted to this rule are chance verdicts and false answers on voir dire, concealing bias, or disqualification. Cont. Ed. of the Bar, Calif. Civ. Proc. During Trial Sec. 2021, at 500 (1960). The affidavits involved herein did not go to the issue of a chance verdict under

state law. They were clearly inadmissible in the federal courts. *Bryson v. United States*, 238 F.2d 657 (9th Cir. 1956); *Stein v. New York*, 346 U.S. 156, 178-179 (1953); see also *Armstrong v. United States*, 228 F.2d 764 (8th Cir. 1956); *United States v. Brown*, 99 F. Supp. 527 (D. Alaska 1951); *United States v. Handy*, 97 F. Supp. 930 (M.D. Pa. 1951), *rev'd on other grounds* 203 F.2d 407 (3rd Cir. 1953), *cert. denied sub nom. Maroney v. United States*, 346 U.S. 865 (1953); *United States v. Furlong*, 194 F.2d 1 (7th Cir. 1952); *Young v. United States*, 168 F.2d 242 (10th Cir. 1948); *United States v. 16000 Acres of Land*, 49 F. Supp. 645 (D. Kan. 1942); *United States v. Cherton*, 309 F.2d 197 (6th Cir. 1962); *Lay v. J. M. McDonald Co.*, 24 F.R.D. 36 (D. Colo. 1959); *United States v. Driscoll*, 276 F. Supp. 333 (S.D.N.Y. 1967); *Moore v. United States*, 1 F.2d 839, 841 (9th Cir. 1924), *cert. denied* 267 U.S. 593 (1925); *Spokane Int'l Ry. Co. v. United States*, 72 F.2d 440, 444 (9th Cir. 1934); *Department of Water & Power v. Anderson*, 95 F.2d 577, 586 (9th Cir.), *cert. denied* 305 U.S. 607 (1938); *United States v. El Rancho Adolphus Products*, 140 F. Supp. 645, 653 (M.D. Pa. 1956), citing *United States v. Nystrom*, 116 F. Supp. 771, 777 (W.D. Pa. 1953).

Bryson v. United States, supra, is not a retreat from *Mely*, but recognizes the distinction between affidavits disclosing outside or extraneous influences or tampering, and those which reveal the process of deliberation and arrival at a decision in the jury room. The latter are inadmissible in the Federal Courts. *Evalt v. United States*, 359 F.2d 534 (9th Cir. 1966) assumed the inadmissibility of the jury affidavits to impeach the verdict. There is no indication in *any* case cited by appellee that it is proper for attorneys to gather inadmissible evidence from jurors. It is against all authority to lodge and file juror affidavits hoping to prove that a verdict was arrived at by failure to follow jury instructions. Such was the purpose here and affidavits should have been stricken.

IV. CONCLUSION

It is respectfully submitted that a judgment upon the jury verdict should be entered as provided in Section 4 of the Clayton Act, 15 U.S.C. Sec. 15.

Dated, San Francisco, California,
July 3, 1968.

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James J. Duryea,
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Certificate of Counsel

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Maxwell Keith,
Attorney for Appellant.

No. 22,148

IN THE

United States Court of Appeals

For the Ninth Circuit

RICHARD S. SIMPSON,
Appellant,

vs.

UNION OIL COMPANY OF CALIFORNIA,
Appellee.

Appeal from the United States District Court for the Northern District of California

APPELLANT'S SUPPLEMENTAL BRIEF

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Subject Index

Table of Authorities Cited

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APPELLANT'S SUPPLEMENTAL BRIEF

A. THE SIGNIFICANCE OF HANOVER

Appellant contends that *Hanover Shoe*[1] requires reversal of the judgment below for the following reasons.

1. *Hanover Shoe* has sustained appellant's position that the Court below was without jurisdiction to dismiss appellant's complaint on the merits with prejudice. The Supreme Court has not yet ruled that the doctrine of prospectivity is applicable in private antitrust cases. As such the Pre-Trial Order and hearing on the equities below were without authority and are in conflict with the Constitution and Sherman Act. Clearly, had *Simpson* been authority for prospective application of Sherman Act decisions the Supreme Court would have said so. Instead it declared that the issue had not yet been decided (88 S. Ct. 2224, 2233).

2. This Court is not required to reach the threshhold proposition as to whether or not the doctrine of prospectivity is applicable to treble damage cases because just as in *Hanover, Simpson v. Union Oil Company of California*[2] did not adopt a radically new interpretation of the Sherman Act. It was not, "such an abrupt and fundamental shift in doctrine as to constitute an entirely new rule which, in effect, replaced an older one. Whatever development in antitrust law was brought about was based to a great extent on existing authorities and was an extension and development of existing authorities which had been growing and developing over the years." *(Hanover Shoe, Inc. v. United Shoe Machinery Corp.,* 88 S. Ct. 2224, 2234.) In 1940 the Supreme Court made clear in *United States v. Socony-Vacuum Oil Company,* 310 U.S. 150 (1940), that price fixing agreements were illegal *per se.* As stated by appellee's chief counsel, Moses Lasky in his article, "*Metaphysics v.*

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[1]The Hanover Shoe, Inc. v. United Shoe Machinery Corp.; United Shoe Machinery Corp. v. The Hanover Shoe, Inc., ... U.S. ...., 88 S. Ct. 2224 (1968).

[2]377 U.S. 13 (1964).

Reality in Antitrust Law," 26 California State Bar Journal 28 (1951), 30:

> "As the decisions now stand, almost, but not quite, every arrangement affecting competition is now likely to be held a restraint. The literal meaning has become almost, but not quite, the accepted meaning[13]".

Prior to *Socony Vacuum,* the Supreme Court made clear in *Ethyl Gasoline Corp. v. United States,* 309 U.S. 436 (1940) that the *General Electric*[3] case would be limited to bona fide attempts by patentees to achieve a reward for their inventions. The Supreme Court made clear that it would pierce schemes to control resale prices under the guise of patent licenses. Then came *Socony-Vacuum* condemning all price fixing arrangements affecting interstate commerce as illegal per se. *Socony-Vacuum* was followed by *United States v. Univis Lens Co.,* 316 U.S. 241 (1942) and by *United States v. Masonite Corp.,* 316 U.S. 265 (1942). In *Univis* the Supreme Court held that *General Electric* did not authorize a patentee who sells his products to be finished by wholesalers and retailers to maintain a system of resale price maintenance even though the wholesalers and retailers may practice the patent. It set forth clear doctrine:

> "Agreements for price maintenance of articles moving in interstate commerce are, without more, unreasonable restraints within the meaning of the Sherman Act because they eliminate competition, . . . , and restrictions imposed by the seller upon resale prices of articles moving in interstate commerce were, until the enactment of the Miller-Tydings Act, 50 Stat. 693, 15 U.S.C.A. § 1 consistently held to be violations of the Sherman Act." (316 U.S. 241, 253).

Masonite held that the Sherman Act prohibited the use of assumedly bona fide agency or consignment agreements by a patentee to maintain resale prices in interstate commerce when not within the confines of a single

[3]United States v. General Electric Co., 272 U.S. 476 (1926).

license to manufacture, use and vend as protected by the patent laws. The basic issue there decided was whether or not the Sherman Act invalidated bona fide agency devices when used to administer prices pursuant to patent licenses even though they were otherwise legitimate contracts. The Supreme Court held that the Sherman Act was paramount in the sphere of attempts of a single company to administer prices in an industry. In so doing, it ruled as follows:

(1) It limited *General Electric* to a case involving a patentee's granting of a license to manufacture, use and vend when entered into for the purpose and with the effect of securing to the patentee only a reward for his invention. (2) Owners of non patented articles could not enter into resale price maintenance. *Masonite* clearly reemphasized *Dr. Miles*[4] as authority preventing the use of agency price administrating agreements (316 U.S. 265, 279-280). (3) A patentee who licenses any more than a single enterprise to manufacture the article and vend could not regulate the resale prices of licensees whether they be deemed bona fide agents or not. (4) The test to be applied under the Sherman Act in marketing arrangements involving agreements fixing resale prices was as follows:

> "So far as the Sherman Act is concerned the result must turn not on the skill with which counsel has manipulated the concepts of 'sale' and 'agency' but on the significance of the business practices in terms of restraint of trade [316 U.S. 280]."

Masonite's[5] severe limiting of *General Electric* to only resale price control incident to a single license to man-

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[4]Dr. Miles Medical Co. v. John D. Parks & Sons Co., 220 U.S. 373 (1911).

[5]Appellee contends that the *Masonite* decision is not apposite here because *Masonite's* facts involved price fixing agency agreements between horizontal competitors. But, of course, *Masonite* cut a deeper thrust than that and clearly was learning that the courts

ufacture, use and vend for the purpose of reward under patent law was followed by a Department of Justice decision to continue to seek to overturn *General Electric* which it sought in *Univis*. The affirmance of *General Electric* only by virtue of an equally divided court in *United States v. Line Material Company,* 333 U.S. 287 (1948) made *General Electric* useless precedent unless patentees followed its precise boundaries. Four justices would have completely overruled *General Electric.* Further the majority of the Supreme Court in *United States v. United States Gypsum Co.,* 333 U.S. 364 (1948) made clear that the Sherman Act's prohibitions against price fixing agreements would govern attempts to use the *General Electric* case as a means of regulating resale prices in interstate commerce; that the *General Electric* case did not authorize the use of price fixing clauses in licenses to manufacture and vend among competitors. The Sherman Act was held predominant over any scheme in restraint of trade. The Court held that *Masonite* compelled the result. And, of course, *United States v. Bausch & Lomb Optical Co.,* 321 U.S. 707 (1944) made clear that a distributor of a trademarked article could not administer resale prices. Then came *United States v. McKesson & Robbins, Inc.*

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under the Sherman Act would determine the effect of agency or consignment agreements in terms of restraint of trade. Even assuming appellee's position, this would not save the Union Oil scheme because its dealers were competitors in the sale of gasoline products. Union Oil raised the McGuire Act defense in the trial court below. After proof that its wholesale division sold gasoline to consumers in competition with retailers (Tr. 1468-1477) and upon an offer to prove horizontal price fixing, Union Oil abandoned this defense (Tr. 1503-1504). Union Oil had to decide whether or not it would use Fair Trade by giving up its wholesaling of gasoline to consumers eliminating its wholly owned operations, establishing a single uniform price, and using court enforcement instead of ouster under *Esso Standard Oil Co. v. Secatore's, Inc.*, 246 F.2d 17 (1st Cir. 1957) cert. den. 355 U.S. 834, and *United States v. McKesson & Robbins, Inc.,* 351 U.S. 305 (1956) or whether to violate existing decisional law by continuing to wholesale to consumer accounts yet using consignment devices with competitive dealers.

supra, at n. 5, which re-emphasized the rule against vertical price control.

Further, the outlawing of the use of coercion on retailers to administer resale prices established in *Federal Trade Commission v. Beech-Nut Packing Co.*, 257 U.S. 441 (1922) was reiterated in *Bausch & Lomb,* and *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960).

In summary, it is clear that prior to June, 1958, the Supreme Court had declared that producers of non-patented articles engaged in interstate commerce could not administer resale prices unless the McGuire Act applied. The result in *Simpson* was not innovative and naturally followed *Masonite.* Just as in *Hanover,* prior to *Simpson,* "potential antitrust defendants would not have been justified in thinking that the then current antitrust doctrines permitted them to do all acts conducive to control of resale prices so long as they used the consignment device." (88 S. Ct. 2224, 2234).

3. Even assuming that potential antitrust defendants could have relied on *General Electric* in 1958, it is clear that *Hanover* does not prevent this court from ruling that the doctrine of prospectivity does not apply to treble damage Sherman Act cases. See Appellant's Opening Brief, pp. 23-37.

B. THE CONTENTIONS OF APPELLEE CONCERNING HANOVER ARE UNMERITORIOUS

Hanover Shoe clearly reversed appellee's primary authority in the arguments below. Appellee had submitted to the court below the appellate court decision in *Hanover Shoe* shortly prior to the day of argument on the so-called equities, April 28, 1967 (Tr. 1697). Yet appellee now takes the position that, in effect, the Supreme Court has already decided in *Hanover* the case

of *Richard S. Simpson v. Union Oil Company of California.* Its reasoning is extraordinary. At pages 5 to 7 of Appellee's Supplemental Brief it summarizes its position. We set forth our comments by reference to these contentions.

(1) Appellee states that *Simpson* established that there could be non-retroactivity in treble damage actions in proper circumstances. As seen above, this is not so. *Hanover* makes it quite clear that *Simpson* did not reach this threshold issue because the Supreme Court specifiically stated that it would not determine whether or not there could be prospective application in treble damage cases of innovative principles. Had *Simpson* decided that matter, the Supreme Court would have indicated such to be the case. Rather it indicated, to the contrary, that it would not reach that issue.

(2) The significance of *Hanover,* according to appellee, is that it spells out the elements governing the retroactivity of the *Simpson* decision in this appeal. But, as indicated above, the Supreme Court has not ruled whether or not the doctrine of prospectivity will apply in civil treble damage actions. In *Simpson* as in *Hanover* the question is reserved. These elements, however, as shown herein, prevent a showing of prospectivity and show that this court need not reach the threshold question.

(3) Appellee urges that the five elements governing principle of retroactivity are mixed questions of law and fact, decided by the District Court in appellee's favor. Appellant urges that *Union Oil* fare no better than did *United Shoe Machinery Company.* Appellant has urged as clearly erroneous or as immaterial and irrelevant the findings of fact decided by the District Court below.

(4) Appellee urges that the District Court's findings on reliance are conclusive. But these findings, even

if relevant, are clearly erroneous. The coercive aspects of the program were not submitted by Union Oil Company to its general counsel but were left to marketing. (Tr. 1176, 1180). There can be no finding of justifiable reliance on this record. Union Oil did not even attempt to obtain the opinion of outside counsel but relied upon an employee to render a decision of law. It has failed to present even a contemporaneous written analysis of the issues by its counsel.

(5) Appellee urges that *Hanover,* in effect, requires a decision in appellee's favor. *Union Oil* cannot meet the *Hanover* tests.

(i) Clearly declared judicial doctrine—as seen above—there never was clearly declared judicial doctrine in 1958 that owners of non-patented articles could administer resale prices against the thrust of the Sherman Act by calling the relationship between it and retailers consignment or agency. Since *General Electric* involved patented articles any indication to the contrary was simply dicta. As stated in Simpson the patent laws were the *ratio decidendi* of the *General Electric* case. 337 U.S. 13, 24. Dicta does not constitute clearly declared judicial doctrine. *Hanover Shoe, Inc. v. United Shoe Machinery Corporation.* (88 S. Ct. 2224, 2234, n. 13.)

(ii) Reliance—Defendant could not validly argue that they relied upon the *General Electric* case even assuming the dicta is construed as clearly declared judicial doctrine. As pointed out above and in Appellant's Reply Brief, pages 9 and 10, since *General Electric* there were six lines of development upon which the retail dealer consignment agreement program would be affected and which Union Oil attorneys were bound to know.

Having learned of the severe limitations placed on *General Electric,* the flat prohibitions against resale price

control and that lease instruments created bona fide real property interests in service station leases which shielded them from marketing arrangements restricting the dealer's independent judgment by use of the leases as coercive devices, Union Oil cannot be treated as an innocent law violator. *Standard Oil Co. of California and Standard Stations, Inc. v. United States,* 337 U.S. 293 (1949), *United States v. Richfield Oil Company,* 343 U.S. 922 (1952) affirming *per curiam,* 99 F. Supp. 280 (1951), see also *United States v. General Motors Corp.,* 121 F.2d 376 (7th Cir. 1941), *Times-Picayune Pub. Co. v. United States,* 345 U.S. 594 (1953), *Northern Pacific Ry. Co. v. United States,* 356 U.S. 1 (1958).

(iii) *Union Oil's* conduct was lawful—*General Electric* did not make lawful the fixing of resale prices by threats and ouster. These factors were absent from the *General Electric* case which was concerned with a stipulated record. But Union chose to use consignment coercively. There was nothing in *General Electric* to sustain using consignment coercively.

(iv) A doctrine which was overruled—*General Electric* was not overruled in *Simpson.* By reason of what is asserted above *Simpson* did not overrule the use of consignment coercively. Even assuming that *General Electric* was clearly declared doctrine for such a proposition, the Supreme Court opinion in *Simpson* clearly did not overrule *General Electric.* The Supreme Court said specifically it refused to extend *General Electric.* 377 U.S. 13, 24. Justice Stewart stated that the majority did not expressly overrule *General Electric.* 377 U.S. 13, 26-27.

(v) Conduct became unlawful only by new rule—Union Oil Company used consignment coercively; there was no new rule announced in *Simpson.* Union Oil was bound to know judicial limitations in *General Electric,* the affirmation of *Dr. Miles, Beech-Nut* and the prohibi-

tion on using short term leases to enforce restrictive marketing arrangements as established in *Standard Oil of California,* supra; *Richfield,* supra.

C. OTHER MATTERS

In its heading, Reply To New Matter In Appellant's Reply Brief, appellee has gone beyond the request of its motion to file a supplemental brief. However, appellee responds as follows:

1. The *Line Material* Case, *United States v. Line Material Company,* 333 U.S. 287 (1948). *Masonite* established the Sherman Act as paramount over assumedly bona fide agency devices. *Line Material* jeopardized *General Electric* as reliable precedent in any field. Nothing appellee Union Oil says contradicts appellant's statement that the applicability of *General Electric* as precedent under the Sherman Act in non-patent cases was repudiated in *Masonite* and *Gypsum.* They clearly indicated that the Sherman Act would govern attempts to administer resale prices when resale price control was not thought to "secure to the patentee only a reward for his invention." (*United States v. Masonite Corporation,* 316 U.S. at 280), and could not cloak arrangements in restraint of trade under the Sherman Act. (Id. 278-280.) *United States v. United States Gypsum Co.,* 333 U.S. 364, 400-401. The case cited by appellee, *United States v. Huck Manufacturing Company,* 227 F. Supp. 791, affirmed by equally divided court, 382 U.S. 197 (1965) was a case decided under patent law. Of course, so was the cited *General Electric* litigation. *United States v. General Electric Company,* 82 F. Supp. 753 (D.N.J. 1949); 115 F. Supp. 835 (D.N.J. 1953). But see *United States v. General Electric Co.,* 80 F. Supp. 989 at 1007 (S.D.N.Y. 1948.)

2. Next, appellant discusses *Perma-Life Mufflers, Inc. v. International Parts Corporation,* 88 S. Ct. 1981 (1968). Appellant fails to see how settled matters decided by a court of law can be used by a court of equity to reach a contrary result. See *Beacon Theatres Inc. v. Westover,* 359 U.S. 500 (1959); *Florists Nationwide Delivery Telegraph Network v. Florists Telegraph Delivery Association,* 371 F.2d 263 (7th Cir., 1967), cert den. 387 U.S. 909 (1967). *Perma-Life* clearly entrenches *Simpson* and makes certain that *Simpson's* conduct in dealing with those bent on promulgating an assumed unlawful scheme does not bar *Union's* liability when viewed either through law or through the eyes of equity.

CONCLUSION

It is respectfully submitted that the judgment be reversed and that judgment in favor of plaintiff be rendered on the jury verdict.

Dated, San Francisco, California,
September 24, 1968.

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James J. Duryea,
By Maxwell Keith,
Attorneys for Appellant.

No. 22148

In the

United States Court of Appeals

For the Ninth Circuit

RICHARD S. SIMPSON,

Appellant,

vs.

UNION OIL COMPANY OF CALIFORNIA,

Appellee.

Appellee's Supplemental Brief

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SUBJECT INDEX

INDEX OF AUTHORITIES

Table of Cases

Statutes

Miscellaneous

No. 22148

In the

United States Court of Appeals

For the Ninth Circuit

RICHARD S. SIMPSON, *Appellant,* vs. UNION OIL COMPANY OF CALIFORNIA, *Appellee.*	

Appellee's Supplemental Brief

Our brief (Brief for Appellee) was filed in this Court on Friday, June 14, 1968. On Monday, June 17, 1968, the Supreme Court decided Nos. 335 and 463, October Term 1967, *The Hanover Shoe, Inc. v. United Shoe Machinery Corp.; United Shoe Machinery Corp. v. The Hanover Shoe, Inc.,* since reported in 20 L.Ed. 2d 1231. Our brief would have cited and discussed the *Hanover* opinion had it been rendered before that brief was filed. Appellant's Reply Brief refers to that opinion defensively but more should be said about it. We submit this Supplemental Brief primarily for that reason.

I.

THE HANOVER SHOE DECISION

In 1953, in *United States v. United Shoe Machinery Co.,* 110 F.Supp. 295 (D.Mass.), Judge Wyzanski found United Shoe guilty of monopolization of shoe machinery in violation of Section

2 of the Sherman Act and enjoined it from offering machines for lease unless it also offered them for sale. This judgment was affirmed in *United Shoe Machinery Corp. v. United States,* 347 U.S. 521 (1954).

Hanover Shoe Company then sued United Shoe for damages inflicted by this violation of Section 2 effectuated by United's policy of leasing machinery and not selling it, and it recovered judgment in the District Court. In *The Hanover Shoe, Inc. v. United Shoe Machinery Corp.,* 377 F.2d 776 (1967), the Court of Appeals for the Third Circuit modified the judgment for several reasons, only one of which is of interest here. The District Court had awarded damages for the full period not barred by the statute of limitations, back to July 1, 1939. United Shoe argued that damages should not be awarded for any period prior to Judge Wyzanski's decision, urging that on three occasions, in 1913, 1918 and 1922, its activities had been before the Supreme Court, and that the "lease only" policy had never been condemned until Judge Wyzanski did so. The Court of Appeals agreed with United Shoe's argument only partially. It held that the Supreme Court's approval in *American Tobacco Company v. United States,* 328 U.S. 781 (1946) of Judge Learned Hand's *Alcoa* analysis of "monopolization" as a violation of Section 2 of the Sherman Act (*United States v. Aluminum Company of America,* 148 F.2d 416 (2 Cir. 1945), was a new interpretation of Section 2 of the Sherman Act, whereby a "lease-only" policy first became illegal, contrary to what it felt had been the implicit view of the Supreme Court in the cases of 1913, 1918 and 1922. The Court of Appeals therefore held that damages could be awarded back to the date of the *American Tobacco* decision in 1946 but not earlier, and in this connection its opinion contains a discussion under the heading "The Retroactive Effect of the Government Decree" in which it cites (in fn. 17) *Simpson v. Union Oil Company of California,* 377 U.S. 13.

The Supreme Court granted certiorari on the petitions of both *Hanover* and *United Shoe.* United Shoe argued that the Court of

Appeals had not applied the principle of non-retroactivity as fully as it should, urging that damages should not have been awarded for the time prior to Judge Wyzanski's decree. Hanover Shoe admitted the principle that an overruling decision should not be given retroactive effect but argued that the principle was inapplicable on the facts, because the *Alcoa-American Tobacco* decisions were not new law and because it was untrue that the Supreme Court had condoned the "lease-only" policy in 1913, 1918 or 1922.

Hanover's brief in the Supreme Court, as petitioner (in No. 335), made this statement (at pp. 31-32):

> "In *Simpson c. Union Oil Co.,* 377 U.S. 13 (1964) this Court considered the application of *U.S. v. General Electric Co.,* 272 U.S. 476. In *General Electric* the Court found unobjectionable the use of the consignment sale method by a patentee to control the prices at which its consignee sold the patented articles, but did not restrict its holding to patented articles, saying expressly that the use of the consignment device was available to the owners of articles either 'patented or otherwise,' 272 U.S. 476, 488. *Simpson* declined to follow *General Electric* so far as unpatented articles are concerned. Likely out of concern for those, including Union Oil, who may have relied on the language of *General Electric,* the Court in ordering a remand, recognized and expressly reserved 'the question whether, when all the facts are known, there may be any equities that would warrant only prospective application in damage suits of the rule governing price fixing by the "consignment" device which we announce today,' 377 U.S. at 24-25. There was in *Simpson* a clear change of a rule the Court had previously laid down. No such change can be found in *Aluminum* or *American Tobacco* or, as we shall see, in the *United Shoe* cases."

In its brief in No. 463 (in which it was respondent) Hanover's argument is set forth in greater detail (at pp. 41-44), but it can be summed up in the statement that unlike *Simpson* its case involved no change in the law and therefore no question of retroactivity. At the time that brief was written, the decision below

in *Simpson v. Union Oil Company,* 270 F. Supp. 754 had been rendered and was cited in United Shoe's brief in the Supreme Court. Hanover's brief in No. 463 stated that *Simpson* was inapplicable because *Simpson* was "a case of a clear change of a rule" (p. 41) and (p. 42) because, also, there "is no claim in this record of reliance by United on counsel, such as there was in the testimony of counsel in *Simpson v. Union Oil Company,* 270 F. Supp. 754 (N.D. Cal. 1967)."

The Supreme Court decided the case on the basis advanced by Hanover; that is, that there had been no change in the law of monopolization (Part III of its Opinion). It held that the *Alcoa-American Tobacco* decisions had not altered the law of monopolization,* saying:

> "The theory of the Court of Appeals seems to have been that when a party has significantly relied upon a clear and established doctrine, and the retrospective application of a newly declared doctrine would upset that justifiable reliance to his substantial injury, considerations of justice and fairness require that the new rule apply prospectively only. Pointing to recent decisions of this Court in the area of the criminal law, the Court of Appeals could see no reason why the considerations which had favored only prospective application in those cases should not be applied as well as in the civil area, especially in a treble damage action. There is, of course, no reason to confront this theory unless we have before us a situation in which there was a clearly declared judicial doctrine upon which United relied and under which its conduct was lawful, a doctrine which was overruled in favor of a new rule according to which conduct performed in reliance upon the old rule would have been unlawful. Because we do not believe that this case presents such a situation, we have no occasion to pass upon the theory of the Court of Appeals.

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*The view of the Court of Appeals had been that before *Alcoa-American Tobacco* a requisite of monopolization under Section 2 was the existence of predatory practices in addition to monopoly power and that those cases changed the law by elimination of the predatory element; also that in prior litigation the Supreme Court had upheld United Shoe's practices.

"Neither the opinion in *Alcoa* nor the opinion in *American Tobacco* indicated that the issue involved was novel, that innovative principles were necessary to resolve it, or that the issue had been settled in prior cases in a manner contrary to the view held by those courts. In ruling that it was not necessary to exclude competitors to be guilty of monopolization, the Court of Appeals for the Second Circuit relied upon a long line of cases in this Court stretching back to 1912. 148 F.2d at 429. * * * These cases make it clear that there was no accepted interpretation of the Sherman Act which conditioned a finding of monopolization under § 2 upon a showing of predatory practices by the monopolist. In neither case was there such an abrupt and fundamental shift in doctrine as to constitute an entirely new rule which in effect replaced an older one."

It is obvious, we submit, that, although it did not mention the *Simpson* case by name, the Supreme Court was plainly contrasting the facts of *Simpson* with the facts of *Hanover.* Appellant's Reply Brief now asserts of the Supreme Court's decision in the *Hanover* case (p. 8):

"In its analysis of the issue the Supreme Court stated that the defense to liability under the Sherman Act because of reliance upon prior law could not even be raised unless (1) there was a clearly declared judicial doctrine, (2) upon which a defendant relied and (3) under which its conduct was lawful, (4) a doctrine which was overruled (5) in favor of a new rule according to which conduct performed in reliance upon the old rule would have been unlawful. Id. at 85,622. Appellant asserts that under the tests laid down in *Hanover Shoe,* Union Oil can fare no better than did United Shoe."

We submit that each of the five elements, as numbered by appellant, is plainly present here.

Our Submission Summed Up

1. *Simpson v. Union Oil Co.,* 377 U.S. 13, established as the *Law of the Case,* for cases involving its consignment rule, that the

principle of non-retroactivity is applicable to a treble damage action in proper circumstances.

2. The Supreme Court did not spell out, in that case, in so many words what were the proper circumstances that would call the principle of non-retroactivity into operation. But what they were was reasonably evident then and has now been articulated in its *Hanover* opinion. They are the circumstances which Appellant's Reply Brief parses into five elements. That is the significance of the *Hanover* decision for this case.

3. Whether those circumstances exist in this case is a mixed question of law and fact, decided by the District Court in appellee's favor.

4. So far as the element of *reliance* is concerned, the findings of the District Court are abundantly sustained by the record and, we submit, are conclusive.

5. No doubt the element of what was the clearly declared prior law and how revolutionary was the new rule are questions of law, on which this Court's views are paramount to that of the District Court. But as to that, we submit (a) that the District Court was clearly right, and (b) that the Supreme Court recognized that its decision in *Simpson* was a new rule "announced today", April 20, 1964. To employ the formulation of the *Hanover* opinion, its decision in *Simpson* plainly recognized that the *Simpson* case involved "a situation in which there was a clearly declared judicial doctrine * * * under which its [Union's] conduct was lawful, a doctrine which was overruled in favor of a new rule according to which conduct performed in reliance upon the old rule would have been unlawful," and left open to be determined on trial whether Union had relied on the former doctrine. No other reason can be given why the Supreme Court closed its opinion in *Simpson* on the controlling sentence:

> "We reserve the question whether, when all the facts are known, there may be any equities that would warrant only prospective application in damage suits of the rule governing price fixing by the 'consignment' device which we announce today."

Appellant's continued assertion that the Supreme Court's decision in *Simpson* was not revolutionary new law is a forlorn hermit in a universal forest of contrary view of those who have written on the subject.

II.

REPLY TO NEW MATTER IN APPELLANT'S REPLY BRIEF

All but one of appellant's arguments on the subject in its Reply Brief (pp. 8, et seq.) were answered in our brief, but that Reply Brief contains this sentence (p. 9):

> "*General Electric* was directly attacked by the Department of Justice and remained as precedent for patented articles by a four to four split. *United States v. Line Material Co.,* 333 U.S. 287 (1948). Its applicability as a precedent under the Sherman Act was repudiated directly in *United States v. Masonite Corp.,* 316 U.S. 265 (1942), and in *United States v. United States Gypsum Co.,* 333 U.S. 364 (1948)."

Because the assertion about *United States v. Line Material* had been made in the court below, had been shown to be unsound, and was not repeated in Appellant's Opening Brief, we assumed that it had been abandoned and therefore did not refer to it in our brief.* Since it has re-emerged in the Reply Brief, we briefly respond. The simple fact is that the *United States v. General Electric Co.,* 272 U.S. 476 dealt with two entirely separate questions (pp. 478, 479, 488). One had to do with the legality of consignment under the antitrust law, i.e., whether it is illegal to appoint an agent to sell one's product and to fix the price at which the agent is to sell the principal's property. That was the pertinent question in the *Simpson* litigation. The other was whether the patent grant permits the patentee to fix the price at which a licensee is to sell—not the patentee's property—but the licensee's property. The Supreme Court in *General Electric* held that the patent grant *does* give that right. *That,* and not the consign-

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*The assertion about *Masonite* was made in Appellant's Opening Brief and has been answered in the Brief for Appellee at page 64.

ment rule, is the principle the Department of Justice has not liked, and that, and not the consignment rule, is what four justices—but not the Court—wanted to overrule in the *Line Material* case; it had nothing to do with consignment at all.*

The *Gypsum* case, cited by appellant in the passage quoted above, is not relevant because it had nothing to do with consignment but involved a horizontal conspiracy to use patent restrictions. That is plain in the face of the decision, and is so stated in *Automatic Radio Co. v. Hazeltine,* 339 U.S. 827, 832.

As an added element among the equities precluding the new rule announced by the Supreme Court in *Simpson* from being applied retroactively, our brief referred to Simpson's own conduct (Brief for Appellee, pp. 52-54). In reply appellant refers (App. Rep. Br., pp. 11-13) to *Perma-Life Mufflers, Inc. v. International Parts Corporation,* 20 L.ed. 982, decided by the Supreme Court on June 10, 1968. *Perma-Life* deals with the question of the extent, if any at all, to which the doctrine of *pari delicto* is applicable

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*Even as to the patent issue, Simpson's counsel is in error in suggesting that *General Electric* has been overruled. It was applied in *United States v. Huck Mfg. Co.,* 227 F.Supp. 791 (E.D. Mich. 1964), and affirmed *per curiam* by an equally divided court in 382 U.S. 197 (1965), a year after the *Simpson* decision, although the Department of Justice in its jurisdictional statement asked the Supreme Court to overrule the patent rule of the *General Electric* case. And see *Prestone Corp. v. Tinnerman Products Inc.,* 271 F.2d 146 (6 Cir. 1959), cert. den. 361 U.S. 964 (1960).

Line Material, decided in 1948, in no way cast doubt on the consignment rule of *General Electric.* In *United States v. General Electric Co.,* 82 F.Supp. 753 (D. N.J. 1949), in a 150 page opinion Judge Forman held that, under the patent-antitrust principles which had been spelled out by the Supreme Court in *Line Material* and similar cases since 1926, General Electric had violated Sections 1 and 2 of the Sherman Act by using its dominant patent position to build a monopoly, but that General Electric's consignment method of distribution did not violate the antitrust laws any more in 1949 than it had in 1926 (82 F.Supp. at 817-826). Four years later, in 1953, when Judge Forman entered the final decree on his 1949 decision, he reasserted the continuing validity of the *General Electric* consignment rule, *United States v. General Electric Co.,* 115 F.Supp. 835, and the Government did *not* appeal. This was but 1 year before Union Oil decided to adopt a consignment system patterned on General Electric's.

in antitrust damage cases and extended the Supreme Court's holding in the *Simpson* case that a plaintiff's participation in an illegal agreement did not preclude him from recovery. Exactly what principle *Perma-Life* lays down has been a subject of discussion and debate. A commentary of June 11, 1968 (No. 361 A.T.R.R. p. A-1) notes that no principle had the concurrence of more than four justices. But all this is quite besides the point. As we said in the Brief for Appellee, at page 54:

> "Here, as throughout his brief, *appellant confuses facts and holdings relevant to the question of what should be the new rule of law with the entirely different question of relevance to the equity issue whether the new rule of law should be retroactively applied.* Of course, if anyone were *now* to act as Simpson did, antipathy to the lack of morals in that conduct would have to succumb to the supremacy of the Sherman Act as now declared. But the issue in the instant case *is the equity or fairness of applying that rule to the events of 1956-1958.*"

On that issue appellant's discussion of *Perma-Life* has no bearing.

CONCLUSION

We respectfully submit that the judgment should be affirmed.

Dated: San Francisco, California, September 10, 1968.

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No. 22,152

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HOLLY SUGAR CORPORATION, APPELLANT

v.

DISTILLERY, RECTIFYING, WINE AND ALLIED WORKERS
INTERNATIONAL UNION, AFL-CIO, et al., APPELLEES

ON APPEAL FROM AN ORDER OF THE UNITED STATES
DISTRICT COURT FOR THE NORTHERN DISTRICT
OF CALIFORNIA

BRIEF FOR APPELLANT

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TABLE OF CONTENTS

TABLE OF CONTENTS (cont'd)

Cases cited | Page

Cases cited (continued) | Page

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I

JURISDICTION

This case is before the Court upon the appeal of Holly Sugar Corporation (hereinafter sometimes referred to as "Holly" or the "Company"), from an order of the District Court of the United States for the Northern District of California (Lloyd H. Burke, J.), granting the motion of appellee Distillery, Rectifying, Wine and Allied Workers International Union, AFL-CIO, et al. to confirm an award of Arbitrator Robert E. Burns issued on January 23, 1967 and denying appellant's motion to vacate this award.

Appellant respectfully submits that the district court erred (i) by granting appellee's motion to confirm the Arbitrator's award; and (ii) by failing to issue an order granting appellant's motion to vacate and set aside the award. The jurisdiction of the Court is invoked under 28 U.S.C. 1291 and 1294.

II

STATEMENT OF THE CASE

A. The Collective Bargaining Relationship Between the Unions and the Company.

As set forth in the record on appeal, the basic underlying facts of this case are virtually undisputed.

Although there were conflicts in the testimony presented in the arbitration hearing, the Arbitrator found it unnecessary to resolve some of these conflicts. These areas of unresolved conflict are not relevant to the determination of this appeal. The Arbitrator's opinion and award is, of course, part of the record before the Court (R. 47-62).[1]

For many years Holly Sugar Corporation has joined with two other corporations, American Crystal Sugar Company and Spreckels Sugar Company, in a multi-employer bargaining unit for the purpose of negotiating collective bargaining contracts with the unions representing the companies' employees at their factories in California. The three sugar companies which comprise the multi-employer bargaining unit are the major producers of beet sugar in California. The

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1. All citations designated "R" are to the transcript of record before the Court which is numbered from Page 1 through Page 229 consecutively. In addition, the transcript compiled in the arbitration hearing is also part of the record and is separately numbered. References to this document will be preceded by the designation "Arb. Tr." Included in the record is a transcript of the argument before the District Court which is also separately numbered. References to this document will be preceded by the designation "Ct. Tr." The current collective bargaining agreement between the parties is also part of the record and appears as Exhibit A to the complaint (R. 12). The current contract is contained in a blue-bound booklet which is separately numbered. For the convenience of the Court, citations to the current contract will be cited both to the record and to the page in the booklet on which the cited material appears e.g. (R. 12 [55-59]).

current agreement, effective from March 1, 1965 to March 1, 1968, covers five factories of Holly Sugar Corporation, four factories of Spreckels Sugar Company and a single factory of American Crystal Sugar Company. The employees at each factory are represented by separate local unions, each of which is affiliated with the United Sugar Workers Council of California and with the Distillery, Rectifying, Wine and Allied Workers International Union, AFL-CIO (hereinafter sometimes referred to as Distillery Workers). The prior collective bargaining agreement, effective from March 1, 1962 to March 1, 1965, covered five factories of Holly Sugar Corporation, three factories of Spreckels Sugar Company and a single factory of American Crystal Sugar Company (R. 13). During the term of the 1962-65 contract, Spreckels Sugar Company built an additional factory at Mendota, California, which was subsequently organized by the Union and thereafter included under the current contract.

Both the current and prior agreements contain, in the main, identical provisions applicable to all the factories of the three companies. However, each contract contains a separat listing of job classifications and wage rates for each of the factories covered by the agreements. Although the process used to produce sugar from sugar beets is fairly standardized, a review of the job classifications and rates discloses that

the number of job classifications and even the wage rates assigned to particular classifications vary significantly from factory to factory.[2/] The master agreement in "Section I-C, Coverage and Recognition" provides that the respective companies recognize each of the local unions as the "sole representative" of the employees at the particular factory (R. 12 [4-5]). Furthermore, Section XVIII provides that:

> "Unless otherwise herein specifically provided, this agreement shall be interpreted and administered as between the Employer and each of the respective unions constituting the first party hereto, in the same manner that said agreement would be interpreted and administered if the terms and conditions of the agreement were incorporated in separate agreements entered into between Employer and each of the respective Unions; and the obligations of the individual employers signing this agreement shall be several and not joint." (R. 12 [33]).

The preceding contract contained identical provisions (R. 13-14, 30).

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2. For the convenience of the Court, attached to this brief as Appendix A is a compilation, in summary form, of particular work classifications of a similar or i'entical nature applicable to separate factories of one or more of the three members of the multi-employer bargaining unit which are paid at different wage rates.

The mechanics of this system of separate agreements between the employers and the local Unions is clearly pointed up with regard to the subject now in dispute, i.e., the work classification and applicable wage rates for painting at the various factories of the three companies. The predecessor contract, 1962-65, provided as follows:

(1) The portion of the contract containing the work classifications and wage scales for American Crystal Sugar Company's Clarksburg factory did not contain a "Painter" job classification (R. 37).

(2) The portion of the master contract containing the work classifications and wage rates for all five Holly Sugar Corporation California factories did not contain a work classification or wage rate for a "Painter" (R. 38-39).

(3) The work classification and wage schedules applicable to the Spreckels and Woodland factories of the Spreckels Sugar Company contained a "Painter" work classification in the Technicians Group A category (the highest rate applicable to bargaining unit employees). The work classification and wage scale applicable to Spreckels' Manteca factory contained a work classification entitled "Painter, Head" in the Technician A category (R. 40-42).

The current master agreement, 1965-68, provides as follows with respect to painting work:

(1) The portion of the master contract applicable to American Crystal Sugar Company is unchanged; it does not contain a Painter classification.

(2) The practice under the predecessor contract of combining all five factories of the Holly Sugar Corporation under one work classification and wage schedule has been discontinued. Each of the five factories has a separate work classification and wage rate schedule. All the Holly factories list a work classification of "Painter (Spray Gun Only)" at the Technician A wage rate.

(3) The portions of the master contract dealing with the work classification and wage rate schedules for "Painter" at the Spreckels, Woodland and Manteca factories of the Spreckels Sugar Company are unchanged. A work classification and wage rate schedule for the new Mendota factory has been added containing a "Painter" classification, Technician A.

B. The 1965 Contract Negotiations

1. The Unions' Demand for Painter Classification and the Company's Rejection of the Demand.

It is undisputed that the above described changes applicable to work classifications and wage rates for the

Holly Sugar Corporation factories, including the factory involved in this grievance at Carlton, California (also known as the Brawley factory), came about as the result of the contract negotiations conducted in the spring of 1965. In addition, there is no material dispute as to the manner by which the "Painter (Spray Gun Only)" job classification for the Holly Sugar Corporation factories was added to the contract.

In March 1965, the negotiations between the companies and the Unions with respect to the provisions of the master contract were temporarily adjourned, to permit discussion of the Unions' job classification demands on a company-wide rather than an industry-wide basis. Subcommittees composed of representatives from each Local Union of the respective companies and Company officials, met to discuss various classification demands. The Holly classification subcommittee considered the Local Unions' demand that a classification of "Painter" be included in the contract for all Holly factories (Arb. Tr. 51, 54, 58, 138, 238). Among the Union representatives on this subcommittee were Mr. William Duncan, then president of Local 174, and Mr. Sam Hickenbottom, both from the Holly Carlton factory.[3/]

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3. (Tr. 55, 195, 255.) At the arbitration hearing an

At the behest of the representatives from the Holly Santa Ana factory, the Locals submitted a demand for a Painter classification at the Technician A rate. At subcommittee meetings held on March 11 and 25, 1965, the Company representatives rejected the demand for a Painter classification (R. 54; Arb. Tr. 138, 239). The Company's chief negotiator, Guy Rorabaugh, Vice President of Operations, objected to the demand for a Painter classification on the ground that the Company's policy consistently had been to have year-round employees perform painting as needed during intercampaign.[4/] Mr. Rorabaugh also objected to the

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(footnote 3 cont'd)

immaterial unresolved dispute arose as to the identity of the chief spokesman for the Union representatives at the subcommittee meetings. Company witnesses testified that Mr. Duncan of Carlton was the chief spokesman for the Union at the subcommittee meetings. The Union witnesses disputed this, stating that Mr. Kelly of Santa Ana was the chief spokesman and that Mr. Duncan had little to say about the "Painter" classification. (Compare Arb. Tr. 141, 239-41, 250 with Arb. Tr. 187, 195-96, 211.) There is no dispute, however, that Local 174 of the Carlton factory had two representatives present at all of the subcommittee negotiations.

4. (R. 52) The beet sugar industry uses an unusual terminology to describe the seasonal operations. The operating periods during which beets are harvested and processed into sugar are called "campaign." The non-operating periods are known as "intercampaign." Seasonal employees who work primarily during the processing period or campaign are designated as "campaign

establishment of a Painter classification on the basis that the Company did not want jobs included in the work classification schedule which were not being filled. However, if the occasion arose when a full time painter was needed, such a classification would be established.[5/]

After the Company rejected the Locals' demand, based in part on the negotiators' belief that there were no employees assigned painting work on a full time basis, the Union representatives thereafter notified the Company that at that time two men were currently engaged full time in

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(footnote 4 cont'd)

employees." Those employees who generally work during both campaign and intercampaign periods are known as "year-round" employees. During intercampaign nearly all campaign employees are laid off. During the intercampaign period the remaining year-round employees, most of whom occupy operating positions during campaign, are assigned to repair and maintain the equipment, machinery and premises, the primary task being to prepare the factory for the next processing period.

5. At the arbitration hearing Mr. Rorabaugh denied that he stated that such a job would be established if the occasion arose when a full time painter was needed (Arb. Tr. 242, 246). This testimony was supported by his aide in negotiations, Mr. Hares, General Manager, Industrial Relations (Arb. Tr. 140, 220). However, the Arbitrator in his award apparently made a finding of fact that such a statement was made (R. 54-55).

painting at the Santa Ana factory (Arb. Tr. 186-87, 239-40). Notwithstanding this claim, the Company continued to reject the demand for a Painter classification (R. 54; Arb. Tr. 138, 239).

2. Counterproposal for a Spray Painter Classification.

At the March 25, 1965, subcommittee meeting, the Company again rejected the Unions' demand for a Painter classification. Thereafter, a counterproposal was made for a Spray Painter classification to be placed in the contract.[6/] The Unions demanded that a Technician A wage rate be paid to an employee performing such work (Arb. Tr. 141, 145). The chief argument advanced for the creation of a Spray Painter classification was that the work was messy, hot, required the use of a mask, and was generally an uncomfortable and unpleasant task to perform, especially when contrasted to brush or roller painting (Arb. Tr. 250).

Initially, the Company accepted this proposal upon

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6. Again an unresolved dispute arose at the hearing regarding which party first proposed an additional work classification for spray painters. Each party claimed the other first proposed the more limited classification in order to compromise the deadlock. (*Compare* Arb Tr. 53, 188, 208 *with* Arb. Tr. 141-42, 145, 239-240.) Obviously, the identity of the party who first proposed the compromise is immaterial.

the condition that the rate be paid only for spray painting work performed in excess of four hours in a day (R. 54). At this juncture, the International Representative of the Distillery Workers, and chief negotiator for the master contract, Mr. Kyle Dickinson, entered the discussion. He objected to the requirement that employees "must work as spray painters for four hours" in order to receive the agreed upon rate. This restriction was unacceptable to Dickinson because he claimed it would afford the Company an opportunity to "chisel" on the higher wage rate by scheduling employees for less than four hours per day on spray painting (Arb. Tr. 54, 56-57).

3. The Final Compromise and Settlement.

The Company acceded to Dickinson's objection to the "four hour" requirement. Thereafter, the Company accepted the Locals' proposal that an employee would be paid at the Technician A wage rate "while a man is on spray painting only" (Arb. Tr. 240). At the next bargaining session on the master contract, the Unions' demand for a Painter classification at the Holly factories was dropped and the Company's last offer was accepted, i.e., the four hour limitation was eliminated and it was agreed that the wage rate was to be paid "while a man is on spray painting only." As a result of the compromise reached during the

1965 negotiations, a work classification of "Painter (Spray Gun Only)" at the Technician A wage rate was included in those portions of the master contract applicable to all five Holly factories in California, including the Carlton factory (R. 54-55).7/

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7. (R. 12 [43, 45, 49, 52, 56]) In this connection, it should be noted that Section XX of the current master contract provides:

> "This contract is in full settlement of the Union's proposals and the Employer's counter-proposals respecting the March 1, 1965 opening, and this new contract and the present pension contracts between the Union and American Crystal Sugar Company, and Holly Sugar Corporation, and Spreckels Sugar Company, as extended by Section XV hereof, shall constitute the full understanding of the parties and settlement of the March 1, 1965 opening.
>
> This contract and the foregoing pension agreements shall not be openable for any purpose or on any matter prior to the date of expiration.
>
> IN WITNESS WHEREOF, the parties hereto have executed this agreement by their respective officers duly authorized so to do, as of the day and year first hereinabove written.
>
> . . . .
>
> LOCAL NO. 174 (Brawley)
> By Wm. A. Duncan
>
> . . . ." (R. 12 [34-35].)

As the Arbitrator noted in his opinion, the testimony at the hearing was in conflict with regard to the work for which an employee was to be paid the Technician A rate (R. 55). Mr. Rorabaugh and Mr. Hanes, the Company's negotiators, testified the agreement reached was that an employee would be paid the spray painting rate only when he was preparing the spray gun, using it, and cleaning it up. These witnesses testified that the preparation of surfaces prior to spray painting was clearly understood by the parties as not included within the job. The Company contended at the arbitration hearing that the Union was attempting to expand the compass of the agreed upon Technician A rate for Painter (Spray Gun Only) to the work of preparing surfaces for spray painting (Arb. Tr. 145, 241-42).

On the other hand, the Unions' witnesses' version of the agreement reached at the 1965 negotiations was quite the opposite, The Unions' witnesses asserted that the parties had not reached agreement, and had not even discussed the rate to be paid for the preparation of surfaces prior to spray painting (Arb. Tr. 190, 193-94, 200-01, 204, 209). In his opinion and award, the Arbitrator concluded, <u>inter alia</u>, that the preparation of painting surfaces was covered because such work is normally

performed as an adjunct to spray painting (R. 59-61).

C. The Employment History of Harold Zimmer at Holly's Carlton Factory.

From the time the Carlton factory first began operations in 1948, maintenance painting had been required. Such painting was generally done during intercampaign by "year-round" employees (R. 52).

Early in 1964, more than a year prior to the execution of the current contract, the Superintendent of the Carlton factory, R. B. Scanlan, decided to hire an employee to do painting. After the grievant, Harold M. Zimmer, called on Superintendent Scanlan in March of 1964 seeking employment, he was hired and assigned to painting work (ibid). At the time of Mr. Zimmer's employment, the master contract applicable to the Carlton factory did not list a painter job classification (R. 38-40, 52). Mr. Zimmer was classified as a Mechanic's Helper, a Station Group A wage rated job (R. 39).[8/] The Mechanic's Helper work classification is a flexible classification, and employees so classified perform a variety of maintenance jobs under the supervision of employees in higher

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8. The full title of the work classification at that time was "Oiler and Mechanic's Helper." The classification is designated as "Mechanic's Helper" under the current contract (R. 39, 12 [57]).

[illegible]

classifications (R. 52-53).

From March 1964, Mr. Zimmer was continuously employed at the Carlton factory, except for a two-month layoff in October-November 1964. Until approximately June 1, 1966, Zimmer devoted all his time to painting of various types including brush, roller, and spray gun painting. During this time, he painted equipment and both the inside and the outside of factory buildings and houses owned by the Company. While Mr. Zimmer was painting, he spent about 65% of his time spray painting and in the preparation of surfaces for spray painting.[9] The balance of his time was spent brush or roller painting and in the preparation of surfaces for this painting (R. 52-53)

From March 1964 through February 28, 1965, Mr. Zimmer was paid in accordance with the work classification to which he had been assigned, i.e., Mechanic's Helper at the Station A rate. After the current contract became effective on March 1, 1965, Zimmer was paid the Technician A rate whenever he was engaged in preparing the spray gun equipment, using the equipment, and cleaning it after use.

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9. One of the major projects assigned Mr. Zimmer was changing the basic color scheme of the factory buildings from aluminum to pastel shades (Arb. Tr. 113).

He was not paid that rate, however, for preparing surfaces to be spray painted; nor was he paid at that rate for painting or preparing to paint with a brush or roller. Zimmer was paid in this fashion until approximately June 1, 1966, when he was assigned to other work because the Company had fairly well completed its painting program (R. 53-54).

During this period, Zimmer did not file any grievance concerning the classification to which he was assigned, the nature of his work assignments, or the rate at which he was being paid (R. 54). Zimmer did, however, complain to Factory Manager Scanlan in approximately December 1964 or January 1965 and to Foreman Clark in February 1966. At those times, Zimmer claimed that the rate at which he was being paid was too low for the work which he was performing. He also registered a similar complaint with Local Union President Duncan in Spring 1965. Subsequently, in December 1965, at President Duncan's suggestion, Zimmer began to keep a record of his painting activities. Thus, as the arbitrator found, the Union had actual knowledge of Zimmer's full time painting throughout the period of his employment (R. 55; see Arb. Tr. 33, 38-39, 41, 45-46, 168-69).

D. The Grievance.

As a result of an election in January 1966, E. J. Neff was elected President of Local 174 at Carlton,

thus deposing William Duncan. On assuming the presidency of the Local, Mr. Neff was presented with a variety of grievances, including a complaint by Mr. Zimmer that he was not receiving a wage rate commensurate with his work tasks (Arb. Tr. 84). Based on Zimmer's complaint, the Union met with local Company officials on February 23, 1966 to discuss the existing pay practice for painting work. At this meeting, the Company officials explained that, in accordance with the Company's understanding of the agreement reached in negotiations as embodied in the collective bargaining contract, they were paying the Technician A rate to employees while they were actually spray painting, and while they were preparing and cleaning the equipment (R. 45).

On April 17, 1966, the Union filed a grievance charging that the Company had violated Sections X-C and X-D of the collective bargaining contract. The grievance stated <u>inter alia</u>:

> "[T]he Company is in violation of <u>the current agreement</u> by the abuse of Paragraph 'C' <u>of the agreement</u> which deals with the provision of 'Temporary Transfer'." (R. 46.) (Emphasis added.)

The grievance further stated:

> "It is the contention of this Union that, the assignment of the position of 'mechanic's helper' does not, in any way, reflect the true classification that should <u>presently</u> be assigned

> to the incumbent painter. It is common knowledge that approximately ninety percent of his endeavour is within the scope painting and that a percentage of that time falls within the classification of 'Spray Painter'. Therefore, it is contended that there is an abuse of the aforementioned paragraphs of the current agreement and it is desired that the position of 'Spray Painter' be properly posted and filled at this time." (Ibid, emphasis added.)

Following the filing of this grievance, on May 2 and 3, 1967, the parties held a two-day grievance committee meeting. At these meetings, the Union sought to expand the grievance to include a demand that the classification of Painter be established at Carlton. The Company rejected this demand on the basis that the 1965 negotiations had disposed of an identical demand, and, therefore, the matter was not arbitrable (R. 51-52). As the parties were thus unable to resolve the matter, it was agreed the matter should proceed to arbitration, although the Company maintained the dispute was not a proper subject for decision and award (R. 52). Accordingly, Arbitrator Robert E. Burns, Esq., San Francisco, California, was selected as arbitrator to hear the matter (R. 46; Arb. Tr. 60-61, 149).

E. The Arbitration Proceeding.

An arbitration hearing was held in San Francisco, California, on July 12, 13 and 29, 1966. At the outset of the hearing, the Arbitrator stated that the matter was

being considered held under the current contract.[10] This statement was nothing more than a recognition of the specific limitation upon the Arbitrator's authority as set forth in the collective bargaining agreement.[11]

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10. The Arbitrator stated: "This is an arbitration proceeding pursuant to a Collective Bargaining Agreement between Holly Sugar Corporation and others and Distillery, Rectifying, Wine and Allied Workers International Union, AFL-CIO and United Sugar Workers Council of California, the Agreement being dated May 28, 1965." (Arb. Tr. 3.) (Emphasis supplied.)

11. (R. 12 [25-27]) For the convenience of the Court, the grievance and arbitration provisions of the master agreement (Section XI) are set forth in Appendix B to this brief. In brief, Section XI provides the following limitations with respect to the resolution of grievances under the contract:

> "All grievances must be presented to Employer in writing, setting forth in detail the nature of the grievance and must be presented within thirty (30) days of the date of the alleged grievance. Otherwise said grievance will not be considered.
>
> . . . .
>
> . . . Either the Union or Employer may, after exhausting the foregoing grievance procedure, submit any unresolved grievance which arose and was presented during the term of this contract and which concerns the interpretation and application of any of the terms or provisions of this contract to an arbitrator for decision in accordance with the following procedure:
>
> . . . In any case, when the Union or Employer refers to arbitration an unresolved grievance which was presented in accordance with the above procedure, the arbitrator who

At the arbitration hearing, the Union through its counsel, sought to expand the grievance by requesting as relief that the Company be required to establish a new job classification of Painter under the current master contract. At the hearing, Company counsel from the outset took the position that the Union's request for the establishment of a Painter classification was <u>beyond the authority</u> of the Arbitrator under the contract. Thus counsel for the Company stated:

> "But the Company's position in summary is that this position of the Union is not arbitrable because it is proposed to add something to the Contract or modify the Contract or change the Contract in a respect which was disposed of in negotiations. The question of adding a painter's classification was discussed in negotiations,

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(footnote 11 cont'd)

> shall hear such grievance shall be selected by lot from the foregoing panel. . . .
>
> It is understood and agreed, however, that <u>proposals to add to or change this contract shall not be arbitrable and that no proposal to modify, amend or terminate this contract may be referred for arbitration under this Section; and no arbitrator shall have any power to amend or modify this contract</u>, except that in the event new jobs are created, the arbitrator shall in such event have the power to act as provided in Section XVII, subparagraph 2, of this contract." (Emphasis added.)

> was rejected by the Company; and the Company's position is that under the terms of Section XI of the grievance procedure, the Arbitrator has no power or authority to modify, change or add to the terms of the Contract; and therefore that any proposal, whether it be in the form of a grievance or not, to add the classification of painter is beyond the scope of the arbitrator's authority." (Arb. Tr. 6, ll. 1-12.)

Company counsel also urged at the hearing that the Union's attempt to expand the scope of the work to be covered by the job classification "Painter (Spray Gun Only)," as agreed to by the parties in negotiations, constituted a further attempt by the Union "to amend the contract." (Arb. Tr. 15.)

In light of the objections made by Company counsel to the authority of the Arbitrator to consider the Union's claims, and in view of the fact, as the Arbitrator noted, that it would be virtually impossible to rule upon the Company's objection without the taking of testimony, it was agreed that the hearing would proceed without prejudice to, and without the Company waiving, its basic objections that the Union's claims primarily involved attempts to obtain by arbitration what it had been unable to obtain at the negotiating table, thereby violating the express restriction in the grievance provision of the contract "that no proposal to modify, amend or terminate this contract may be referred for arbitration under this Section."

Following the three-day hearing, the Arbitrator issued his opinion and award on January 23, 1967. In his decision, the Arbitrator made the following award:

> "1. The company violated the master contract by failing or refusing to establish a Painter work classification and by refusing to post and fill the Painter (Spray Gun Only) work classification.
>
> 2. The issue with respect to the establishment of the Painter work classification under the 1962 contract is arbitrable at this time under the provisions of the 1962 contract and the issue with respect to the Painter (Spray Gun Only) is arbitrable under the 1965 contract.
>
> 3. Grievant Zimmer is entitled to back pay from the date of his employment in March 1964 for the period while he worked as a Painter or a Spray Gun Painter or both computed upon the difference between the Technicians Group A rate of pay and the pay which grievant Zimmer actually received while working as a Painter or Spray Gun Painter." (R. 61-62.)

With respect to his first determination, the Arbitrator concluded, contrary to the Company's contention and the testimony of its witnesses, that the preparation of surfaces for spray painting was included within the job classification "Painter (Spray Gun Only)." He further concluded that since the "majority of his [Zimmer's] work was as a spray painter, including the preparation of surfaces, . . . he is entitled to be classified and paid as a Painter (Spray Gun Only) from March 1, 1965, forward for the period when he performed this work" (R. 61).

The Arbitrator based the aspect of his award which requires the establishment of a new position of Painter to be compensated at the Technician A rate upon his determination that in the assignment of Zimmer to painting in March 1964 the Company had, in effect, established a new position. The Arbitrator further held that the Company had violated Sections XVII-2 and VIII-G of the contract in March 1964 by assigning Zimmer to painting work without negotiating with the Union with respect to the creation of a new job classification of Painter.[12/]

Although acknowledging that both Zimmer and the Union had full knowledge of the nature and extent of Zimmer's painting activities from the time of his hire, the Arbitrator held that he was not barred from granting a remedy under the old contract because the Company had not, at the time of Zimmer's hire, posted a new job of Painter and, therefore, "both the 30-day limitation of the 1962 contract and any other limitation were tolled." In reaching

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12. In the Arbitrator's opinion, some confusion may result from several typographical errors. In his opinion, the Arbitrator refers to "Article VII-G" (R. 56), and twice refers to "Section X-G" (R. 57). These references are in error and obviously were intended to refer to Section VIII-G of both the predecessor and the current master contracts.

this latter decision, the Arbitrator acknowledged both that the Union had actual notice of the Company's assignment of Zimmer throughout the period and that the Union had, during the course of the negotiations for the 1965 master agreement, unsuccessfully sought to obtain a Painter classification in the contract. Indeed the Arbitrator recognized that the Union's demand for a Painter classification had led to a compromise by the parties which resulted in the establishment of the classification "Painter (Spray Gun Only)." Furthermore, while concluding that "the 30-day limitation of both the 1962 and the 1965 contracts was tolled until knowledge or information was received by the Union which would have the effect of putting the Union on notice" and further stating that "[t]his knowledge was not received until the early part of 1966 when the grievance here under consideration was filed," it is clear from the Arbitrator's decision that the "knowledge" of the Union as to the nature and extent of the painting work performed by Zimmer was exactly the same at the time the grievance was filed as it was during the entire time that Mr. Zimmer was engaged in painting (R. 58).

On February 17, 1967, the Company made a motion to the Arbitrator for a vacation of his opinion and award as exceeding his authority. This motion was subsequently

denied on April 3, 1967 by the Arbitrator as being beyond his authority to grant.

F. The District Court Proceeding.

On April 11, 1967, the Company brought an action under Section 301 of the Labor-Management Relations Act, 29 U.S.C. § 185, in the United States District Court for the Northern District of California to set aside or appropriately modify or correct the award. On May 19, 1967, the Union filed a motion for an order confirming the Arbitrator's award.

On July 6, 1967, a hearing was held before United States District Judge Lloyd H. Burke on the motions made by the respective parties. At the opening of the hearing on the motion to vacate the Arbitrator's award and the countermotion to confirm that award, the court announced:

> "It is my tentative conclusion that there is really only one question before this Court despite the fact that possible argument is offered in other areas. The issue, as I see it, is whether or not the arbitration proceedings, in and of themselves, confer jurisdiction on the arbitrator and, if he didn't have it to start with, did it acquire as a part of the acquiescence of the parties in allowing the arbitration to proceed to what amounted to a final determination of the issues. If there was jurisdiction in the arbitrator, I think that ends the

case once and for all."[13]

In the course of the argument on the respective motions, the court announced its view of the standards applicable to suits to set aside an arbitration award.

> "THE COURT: When you come back here, you are going to be stuck with the general proposition that unless the arbitrator has been so arbitrary in his function and unreasonable as to also equate his actions with deliberate dishonesty, it must stand whether the trial court would regard the results as patenly [sic] unreasonable or improper.
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> . . . .
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> THE COURT: I am pretty much of the opinion, Mr. Davis, that unless you can establish that the arbitrator had his hot little hands out to receive a bribe, that's about as far as you need go. There is almost unlimited power in the arbitrator once the parties have submitted to him for arbitration."[14]

Applying the above standard, the court granted the defendant Union's motion to confirm the Arbitrator's award. On August 4, 1967, the Company filed its notice of appeal.

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13. Holly Sugar Corp. v. Distillery, Rectifying, Wine & Allied Workers International Union, AFL-CIO, et al., No. 46870 (N.D. Calif. July 6, 1967) (Ct. Tr. 1-2).

14. Id. at 34-35, 48.

III

ARGUMENT

The District Court Erred in Refusing to Set Aside or Appropriately Modify the Arbitration Award and in Granting an Order Confirming the Award.

A. The Applicable Judicial Authority.

In Textile Workers Union v. Lincoln Mills of Alabama, 353 U.S. 448 (1957), the Supreme Court held that Section 301 of the Labor-Management Relations Act "authorizes federal courts to fashion a body of federal law for the enforcement of these collective bargaining agreements and includes within that federal law specific performance of promises to arbitrate grievances under collective bargaining agreements." Id. at 451. In holding that Section 301 conferred authority on federal courts "to fashion a body of federal law" in the enforcement of the contractual commitments embodied in collective bargaining agreements, the basic contribution of the Court's decision to the body of developing federal law was the establishment of the principle that agreements to arbitrate grievance disputes could be specifically enforced by a federal court despite the provisions of the Norris-La Guardia Act. While

Lincoln Mills was a necessary first step in formulating federal law in this area, it left unanswered a number of important questions. Thereafter, in Charles Dowd Box Co., v. Courtney, 368 U.S. 502 (1962), the Court held that such suits could be maintained under Section 301 in state courts as well as in federal courts. In Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95 (1962), it was decided that federal labor law principles apply whether the suit is commenced in a federal or in a state court.

The Supreme Court's decision in Lincoln Mills left largely unresolved the role to be played by the judiciary in actions involving the parties' agreement to arbitrate disputes. In the now famous Trilogy cases,[15] the court focused on this problem. Two of the Trilogy decisions, the American Mfg. Co. case and the Warrior & Gulf case, involved suits to compel arbitration. In both cases the defense raised was that the matter for which arbitration was sought was not encompassed by the grievance and arbitration provisions of the particular collective

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15. United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

bargaining agreement; that is, that the matter was "non-arbitrable" under the contract. In reversing the decisions of the courts of appeals in these two cases which had held that the matters presented for arbitration were not arbitrable, the Supreme Court, in essence, decided that the so-called Cutler-Hammer doctrine[16] was not to become part of the body of federal substantive law applicable to suits to compel arbitration under Section 301. In Cutler-Hammer, the New York court had held that "If the meaning of the provision of the contract sought to be arbitrated is beyond dispute, there cannot be anything to arbitrate and the contract cannot be said to provide for arbitration."[17] In short, the Supreme Court held in American Mfg. Co. and Warrior & Gulf that even though under the substantive provisions of the contract an arbitrator could only correctly decide the merits of the dispute in favor of the party resisting arbitration, such a determination was not sufficient to foreclose arbitration of the matter. Arbitrability of a dispute as a threshold question was thus, in the Court's view, dependent

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16. International Ass'n of Machinists v. Cutler-Hammer, Inc., 271 App. Div. 917, 67 N.Y.S.2d 317, aff'd per curiam, 297 N.Y. 519, 74 N.E.2d 464 (1947).

17. 67 N.Y.S.2d at 318.

upon the scope of the grievance and arbitration commitment between the parties. The court recognized, however, in its companion decision in Enterprise Wheel that challenges to the validity of an award, following the exhaustion of the arbitration process, involved different considerations.

While in effect holding that courts should be wary of foreclosing resort to arbitration, the Court was careful to note that even where the suit was one to compel arbitration of a dispute under the contract, the question of whether the matter was "arbitrable," i.e., encompassed by the agreement to arbitrate, was a matter for judicial determination.[18/] Thus, as Mr. Justice Douglas, writing for

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18. Subsequent decisions of the Supreme Court have fully resolved all possible debate relating to the courts' role and scope of authority over questions of arbitrability. The arbitrability of a dispute is for judicial determination. "[W]hether or not the company was bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the Court on the basis of the contract entered into by the parties." Atkinson v. Sinclair Refining Co., 370 U.S. 238, 241 (1962); John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 547 (1964). Further, the federal courts are unanimous in holding that a party preserves his right to challenge judicially the arbitrator's authority by raising his objections to the arbitrability of the dispute in the hearing before the arbitrator. E.g., Local 719 Bakery & Confectionery Workers v. National Biscuit Co., 378 F.2d 918, 921 (3d Cir. 1967); District 50, UMW v. Pittston Co., 210 F. Supp. 781, 786 (N.D. W. Va. 1962).

the Court, stated in the Warrior & Gulf case:

> "The Congress, however, has by § 301 of the Labor Management Relations Act, assigned the courts the duty of determining whether the reluctant party has breached his promise to arbitrate. For arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit. . . ." 363 U.S. at 582.

Similarly, Mr. Justice Brennan in his concurring opinion in these cases pointed out:

> "To be sure, since arbitration is a creature of contract, a court must always inquire, when a party seeks to invoke its aid to force a reluctant party to the arbitration table, whether the parties have agreed to arbitrate the particular dispute. In this sense, the question of whether a dispute is 'arbitrable' is inescapably for the court." 363 U.S. at 570-71.

In the same concurring opinion, Justice Brennan pointed out that arbitration provisions vary substantially from contract to contract and that obviously "the parties are free to make that promise as broad or as narrow as they wish, for there is no compulsion in law requiring them to include such promises in their agreement." Id. at 570.

In the third case of the Trilogy, United Steelworkers v. Enterprise Wheel & Car Corp., supra, the court was faced with a different question, namely, the authority of a district court when confronted with a suit under Section 301 to enforce an arbitration award. Here, the defendant had resisted the award and defended the action

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on the ground that the award exceeded the arbitrator's authority under the contract. While concluding, in disagreement with the court of appeals, that the arbitration award was consistent with the authority conferred by the contract, the Court quite carefully noted that had the arbitrator exceeded his contractual authority, the Court would have had no choice but to refuse enforcement. Thus, the Court stated (363 U.S. at 597):

> "[A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award."

The Court in the Trilogy cases thus drew a distinction between the jurisdiction of the arbitrator to hear the case and his authority under the contract to render a particular award. Both the nature of this distinction and its rationale were the subject of a discerning article by Judge Paul R. Hays of the United States Court of Appeals for the Second Circuit, who for many years prior to his elevation to the bench was a recognized scholar in the labor relations field as well as a distinguished arbitrator.

Writing in 74 Yale Law Journal 1019, 1020-21 (1965),[19]

Judge Hays stated in pertinent part:

> "The Court of Appeals for the Second Circuit has clearly drawn the distinction between arbitrability, that is, the arbitrator's 'jurisdiction' to hear the case, and the subsequent action for enforcement of his award. The court held that certain limiting language in a collective agreement went not to the arbitrator's 'jurisdiction' but to his 'authority' to make an award.
>
> > Should his decision or the remedy exceed the bounds of his authority as established by the collective bargaining agreement, that abuse of authority is remediable in an action to vacate the award.
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> In United Steelworkers v. American Manufacturing Company, the first of the 1960 trilogy, the Supreme Court said that even a frivolous claim is arbitrable because of the 'therapeutic values' in the processing of all claims. This does not mean, though, that an award based on a frivolous claim is enforceable in the courts. In New Bedford Defense Products Div. v. Local 1113, UAW, a First Circuit case which is cited with approval in American Manufacturing, the district court held an issue arbitrable although it could be 'correctly decided only one way.' The appellate court likened the jurisdiction of an arbitrator to that of a court and said:
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> > If the subject matter of a claim is within the court's jurisdiction, the court does not

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19. This article entitled "The Future of Labor Arbitration" was originally the third of the Storrs lectures on Jurisprudence delivered by Judge Hays at the Yale Law School in November 1964. These lectures have since been collected and published as a volume entitled "Labor Arbitration: A Dissenting View" (Yale University Press 1966).

lose its jurisdiction because of the fact that the proper disposition of the claim may be crystal-clear under the law.

Holding that such an issue is arbitrable does not mean, I think, that an arbitrator's award should be enforced if he decided the issue in favor of the claim. In the words of the Second Circuit, the arbitrator has jurisdiction to be wrong. The question is whether he has authority to decide issues contrary to the provisions of the contract.

The point I make may be illustrated by supposing a collective bargaining agreement which provides: 'The employer shall have unfettered discretion under all circumstances, and as if no collective bargaining agreement existed, to contract out whatever work he chooses.' The union raises a grievance concerning the employer's having contracted work out. Under the authorities it appears that the grievance is arbitrable if the union claims that it arises under the agreement. Now let us suppose that the arbitrator awards in favor of the union and writes an award in which he says 'I have disregarded the contractual provision because I believe it to be unfair and inequitable. I have preferred to dispense my own brand of industrial justice which appears to me to be superior to the collective bargaining agreement.' His award, says the Court, 'is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.' The arbitrator would have jurisdiction to arbitrate the issue, but no authority under the collective agreement to make such an award. Nor can it be that the result depends on what the arbitrator says in his opinion. Suppose instead of announcing that he was disregarding the contractual provision he stated that he read it to prohibit all contracting out. Surely he would be equally faithless to his obligation. Or he might say nothing about the contract provision or even write no opinion. Has he not equally exceeded his authority?" (Footnotes omitted.)

As Judge Hays aptly stated in the foregoing article, "No great harm is done by applying a liberal rule as to arbitrability, if the court carefully scrutinizes what the arbitrator later decides." Id. at 1019.

B. The Arbitrator exceeded his authority under the contract by requiring the establishment of a Painter classification under the current collective bargaining agreement and in effect providing such a classification under the expired master contract.

1. By adding a job classification covering painting work in general to the current contract, the Arbitrator amended and modified that contract in direct violation of the express restrictions imposed on his arbitral authority by the contract and in obvious contravention of the ultimate agreement reached by the parties in their negotiations.

It is clear from the foregoing section and the decisions cited infra that the court below applied an erroneous standard in considering appellant's application to set aside or appropriately modify the arbitration award involved in this proceeding. These decisions do not delegate to the Arbitrator the right to determine his authority under the contract. On the contrary, it is clear that the scope of the Arbitrator's authority is a matter for judicial decision. Nor do these cases hold that "just about everything

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goes once it [the dispute] gets to arbitration." (Ct. Tr. 35.) And most assuredly judicial inquiry is not limited to those instances where the arbitrator has been deliberately dishonest or has accepted a bribe (Ct. Tr. 34-35, 38). As we now show, the proper judicial standards which should be applied in such cases require that the Arbitrator's award be set aside, at least to the extent that the award established a Painter classification under the present contract and, in effect, provided for a Painter classification under the expired agreement. This result is required because the Arbitrator's authority to render such an award was excluded by both contracts.

In Torrington Co. v. Metal Prods. Workers Union, Local 1645, 362 F.2d 677 (1966), the Court of Appeals for the Second Circuit, applying the foregoing principles, set aside an arbitration award in a context nearly identical to the situation presented in the matter before the Court. In Torrington the company had a 20-year-old policy of permitting employees time off with pay to vote on election days. In its newsletter of December 19, 1962, the company announced that it was discontinuing this policy. Although the union representing the employees did not attempt to arbitrate the company's unilateral withdrawal of this longstanding benefit,

it filed an unfair labor practice charge with the National Labor Relations Board charging that the unilateral change of the election day policy constituted a violation of the Labor-Management Relations Act. The unfair labor practice charge was subsequently dropped by the union.

In August 1963, the parties began negotiations for a new contract. At the outset of those negotiations the company notified the union that it would no longer grant paid time off for voting. The union responded by including in its contract demands a written proposal for a provision in the contract which would grant employees time off for voting. The union's demands, including this proposal, were presented at a negotiating meeting held in August or September. Thereafter the parties were unable to reach agreement on a new contract and a long strike ensued. During the strike a number of the employees continued to work. None of these employees, however, were given time off to vote in the 1963 election.[20/]

The company refused to accede to the union's demand that the contract contain a provision granting

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20. Apparently no election had taken place from the time of the company's announcement in December 1962 until the 1963 election.

employees time off for voting. As the court noted in its opinion, the union's proposal for the inclusion of this benefit was a bargainable matter. (362 F.2d at 682.) Although the record was admittedly "somewhat unclear as to the circumstances surrounding the negotiations," the union's demand for this benefit was not included in the contract which was eventually signed in January of 1964. (362 F.2d at 678.) When the company refused to allow employees time off for voting in the 1964 election, the union promptly filed a grievance alleging that the company's action violated the contract and sought arbitration of the dispute.

In his award the arbitrator, after deciding that the dispute was arbitrable under the contract, concluded as follows (362 F.2d at 679):

> "[T]he benefit of paid time off to vote was a firmly established practice at Torrington, that the company therefore had the burden of changing this policy by negotiating with the Union, and that in negotiations which culminated in the current bargaining agreement the parties did not agree to terminate this practice. Finding further that this employee benefit was not within management's prerogative under the management function clause of the contract, the arbitrator held that the employees who took time off to vote on November 3, 1964, or who worked on that day and had received an election benefit in 1962 must be paid a comparable benefit for election day in 1964." (Footnote omitted.)

The company thereupon brought an action in the United States District Court for the District of Connecticut

to vacate the award. The District Court (T. Emmett Clarie, J.) entered an order setting aside the award based on its determination that the arbitrator "had exceeded his authority by reading the election day benefit into the new contract after the parties had negotiated the issue but had made no such provision in that contract." (362 F.2d at 677.) On appeal, the Court of Appeals affirmed the District Court's decision.[21/]

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21. The Torrington decision represents the fourth court of appeals to recognize the rapidly expanding body of decisional law holding that an arbitrator's award which is not supported by the contract, or which is contrary to an express limitation on the arbitrator's authority, should not be enforced. H. K. Porter Co. v. United Saw, File & Steel Prods. Workers, 333 F.2d 596 (3d Cir. 1964); Truck Drivers Local 784 v. Ulry-Talbert Co., 330 F.2d 562 (8th Cir. 1964); Textile Workers Local 1386 v. American Thread Co., 291 F.2d 894 (4th Cir. 1961). Similarly, a court of appeals will refuse to enforce an arbitrator's award if the arbitrator has decided issues other than those submitted to arbitration by the parties, e.g., Kansas City Luggage & Novelty Workers v. Neevel Luggage Mfg. Co., 325 F.2d 992 (8th Cir. 1964); Local 791, IUE v. Magnavox Co., 286 F.2d 465 (6th Cir. 1961), or when his decision requires one party to violate a state or federal statute, Glendale Mfg. Co. v. Local 520, ILGWU, 283 F.2d 936 (4th Cir. 1960), cert. denied, 366 U.S. 950 (1961); Puerto Rico Dist. Council of United Bhd. of Carpenters v. Ebanisteria Quintana, 56 L.R.R.M. 2391 (D.P.R. 1964).

Finally, even in suits to compel arbitration which resulted in an order to arbitrate, the courts have cautioned that enforcement of the resultant arbitral award will not be granted if the arbitrator goes beyond his authority in making his award. E.g., Carey v. General Elec. Co.,

In reaching its decision, the Court of Appeals relied on the fact that the arbitration provision in the collective bargaining agreement between the company and the union limited the arbitrator's authority by providing that he "shall have no power to add to, delete from or modify, in any way, any of the provisions of this agreement." Id. at 678 n.2. Based on this provision and upon the history of the collective bargaining negotiations wherein the union had sought unsuccessfully to have this benefit added to the contract, the court concluded that the union was seeking to obtain by arbitration the very benefit which it had been unable to obtain during the course of negotiations. Thus, as Chief Judge Lumbard stated in the court's opinion (362 F.2d at 681-82):

> "While it may be appropriate to resolve a question never raised during negotiations on the basis of prior practice in the plant or industry, it is quite another thing to assume that the contract confers a specific benefit when that benefit was discussed during negotiations but omitted from the contract.
>
> > '[I]n entering into a collective agreement, in the negotiations for which as much care and deliberateness were exercised in respect to the omission as to the inclusion of various restraints and

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315 F.2d 499, 508 (2d Cir. 1963); International Ass'n of Machinists v. Hayes Corp., 296 F.2d 238, 242-43 (5th Cir. 1961); Lodge No. 12, IAM v. Cameron Iron Works, Inc., 292 F.2d 112, 118 (5th Cir. 1961).

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> obligations, neither party agreed to submit to an arbitrator the question of whether it should be subjected to the very restraint or obligation which in negotiations the parties, by omitting it from the contract, agreed the contract should not subject it to.' Freidin, supra note 4, at p. 12.
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> . . . .
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> In light of this uncontroverted fact, and bearing in mind that the arbitrator has no jurisdiction to 'add to' the 1964 agreement, we do not think it was proper to place the 'burden' of securing an express contract provision in the 1964 contract on the company. At the start of negotiations, Torrington announced its intent to continue its previous change of election day policy. This was an express invitation to the Union to bargain with respect to this matter. After the Union failed to press for and receive a change in the 1964 agreement, the company was surely justified in applying in November 1964 a policy it had rightfully established in 1962, and had applied in November 1963 (during the strike).
>
> In our opinion, the Union by pressing this grievance has attempted to have 'added' to the 1964 agreement a benefit which it did not think sufficiently vital to insist upon during negotiations for the contract which ended a long and costly strike. We find this sufficiently clear from the facts as found by the arbitrator to agree with the district court that the arbitrator exceeded his authority by ruling that such a benefit was implied in the terms of that agreement." (Emphasis added.)

A comparison of the situation involved in Torrington and the instant case discloses that the issues presented to the Court of Appeals for the Second Circuit and the issues presented to this Court are nearly identical in all respects.

Indeed, we submit, the instant case presents more compelling reasons for setting aside the Arbitrator's award.

Unlike Torrington, where the matter in dispute had been for some 20 years a benefit enjoyed by employees, here the painting work at Holly's factories had never been compensated for at the Technician A rate even though such work was performed from the time the factories were built. Furthermore, in Torrington, as the court acknowledged, "the record [was] somewhat unclear as to the circumstances surrounding the negotiations." (362 F.2d at 678.) Indeed, a reading of the opinion reveals only the following with respect to the negotiations concerning this 20-year-old benefit: the union had made a written contract demand for voting time off; the company rejected this demand, and thereafter the new contract did not expressly provide such a benefit. Based on this sequence of events, and adopting the district court's reasoning that "labor contracts generally affirmatively state the terms which the contracting parties agree to,"22/ the Court of Appeals concluded that time off for voting had not been part of the parties' ultimate agreement. 362 F.2d at 681-82.

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22. 362 F.2d at 679.

While we concur that the bargaining history in _Torrington_ necessitated the court's ultimate determination and furnished an adequate basis for setting aside the award, we submit that the history of the 1965 negotiations with respect to the Union's demand for a Painter classification is, unlike _Torrington_, both clear and undisputed. Therefore, a similar result is even more persuasively compelled. During the subcommittee meetings held between Company and Union representatives, the Union initially demanded that a classification covering all painting work be added to the contract. This demand was consistently rejected by the Company. Thereafter, a proposal was made to add a classification covering merely spray painting work. Initially, the Company accepted this proposal upon the condition that the rate be paid only for that spray painting work performed in excess of four hours in a day. The Company's proposed limitation on the payment of the Technician A wage rate for spray painting was rejected by the Union. The Company thereafter agreed to remove the four-hour limitation. Thus, the final agreement of the parties with respect to the Union's demands relating to painting and spray painting work was that a job classification in the Technician A wage rate would be established which would be applicable to spray painting only, without any minimum work time limitation.

This understanding was embodied in the final contract agreed to by the parties by adding the designation "Painter (Spray Gun Only)."

In sum, the undisputed history of the collective bargaining negotiations in 1965 which led to the inclusion in the current master agreement of the work classification "Painter (Spray Gun Only)" leaves no doubt that the parties agreed that no general overall Painter classification would be included in the collective bargaining agreement. For not only was the Union's initial demand rejected, as in Torrington, but here the record clearly reveals both the process by which the parties compromised their differences and the exact nature of that compromise. Furthermore, the resulting contract not only failed to include the Union's demand, as was the case in Torrington, but in fact included a clause setting forth the compromise reached in the negotiations. The contract thereby embodied the full extent of the parties' agreement. In these circumstances, there can be no doubt that in requiring a Painter job classification to be added to the current contract, the Arbitrator violated the express contractual interdiction against amending or modifying the agreement. Accordingly, this Court must set aside the

award.23/

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23. Even prior to the Second Circuit's decision in Torrington, this court held that in determining the authority conferred upon the arbitrator, the collective bargaining agreement must be "construed in the light of bargaining history between the parties and the interpretations placed on the contract by the parties." Communications Workers v. Pacific N.W. Bell Tel. Co., 337 F.2d 455, 456 (9th Cir. 1964); see Pacific N.W. Bell Tel. Co. v. Communications Workers, 310 F.2d 244 (9th Cir. 1962), reversing and remanding 199 F. Supp. 689 (D. Ore. 1961). This case involved a suit for declaratory judgment by the Company that it had no obligation under the terms of the collective bargaining agreement with the union to arbitrate its action in imposing the discipline of suspension upon an employee. The issue before the district court was whether an arbitrator had authority to entertain a grievance relating to a disciplinary suspension by the company. The district court initially concluded that under the terms of the contract the employer was required to arbitrate the matter. 199 F. Supp. 689 (D. Ore. 1961).

On appeal this court reversed on the basis of its determination that the court below had erred by limiting its consideration of the arbitrator's authority to a review of the terms of the contract, thereby excluding the company's proferred evidence with respect to the bargaining history of the agreement. In offering this evidence, the company sought to establish that disciplinary suspensions were excluded from the grievance and arbitration procedure of the contract. In reversing the district court, this court stated:

> "The [bargaining] history discloses that the union unsuccessfully attempted to secure a provision expressly including disputes relating to disciplinary suspension within the reach of the arbitration clause.
>
> This evidence then went to the judicial issue and not to the merits. It was error

2. By, in effect, establishing a job classification encompassing all painting work under the agreement which had expired on March 1, 1965, and granting relief under that agreement, the Arbitrator violated the contractual restrictions on his authority contained in both contracts, which expressly limit his authority to make an award to matters "which arose and are presented during the term of this contract and which concern the interpretation or application of any of the terms of this contract."

We now turn to a consideration of the second aspect of the Arbitrator's award and show that in establishing a

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(footnote 23 cont'd)

> to exclude it from consideration." 310 F.2d at 249.

On remand the district court concluded that the collective bargaining contract, construed "in light of the bargaining history between the parties," did not obligate the company to submit to arbitration disciplinary suspensions. 337 F.2d at 456. On further appeal to this court, the union claimed that it was error to consider the bargaining history in determining the scope of the arbitrator's authority under the contract and requested that the court re-examine and reverse its earlier decision. After reviewing a number of decisions, including the Supreme Court's decisions in the Trilogy cases, this court affirmed its earlier opinion, stating that it could not "square" the position urged by the appellant union with the Supreme Court's holdings in the Trilogy cases. As this Court stated in its second decision (337 F.2d at 459):

> "The very nature of a collective bargaining agreement requires that it be read in the light of bargaining history and the history of the parties' own interpretation. A new technical

Painter classification and in granting relief under the old contract, the Arbitrator further exceeded his authority under both agreements. As already noted, both the prior contract and the present agreement contain identical grievance and arbitration provisions. Under both contracts, the Grievance Committee is restricted to considering only matters "<u>which arise and are presented during the term of this contract and which concern the interpretation or application of any of the terms or provisions of this contract</u>" (emphasis added). Furthermore, the Arbitrator is empowered to consider only those unresolved grievances "<u>which arose and are presented during the term of this contract and which concern the interpretation or application of any of the terms of this contract</u>" (emphasis added). It is significant that the parties, knowledgeable in the drafting of collective bargaining agreements, twice placed in their contract the dual limitation that only

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(footnote 23 cont'd)

> rule of evidence which would render incompetent parol evidence of a party's intent would seem peculiarly inappropriate in the area of collective bargaining." (Footnotes omitted.)

<u>See also</u> cases cited in this Court's second opinion, <u>337 F.2d</u> at 458 n.2.

those grievances arising and presented during the term of the agreement and involving the interpretation and application of the particular agreement could be presented to the Grievance Committee and thereafter be submitted to arbitration. It would be difficult to phrase in clearer language a more explicit limitation on the Arbitrator's authority.

Applying these jurisdictional provisions to the award, it is evident that disputes which arose during and concerned the prior agreement could not be entertained by the Arbitrator. Specifically, the question of whether the Company may have violated the prior contract by failing to establish a Painter work classification was placed beyond the Arbitrator's domain by these express exclusionary provisions. Accordingly, the Arbitrator's award, to the extent that it in effect established a job classification with respect to painting work under the prior contract exceeded his authority under both agreements.

In reaching this aspect of his decision, the Arbitrator concluded that in assigning Zimmer to painting work in March 1964, the Company "established a new position or job classification of painter." (R. 56.) The Arbitrator then concluded that by failing to post this "new job," the Company violated Section VIII-G of the contract and that this failure to post somehow prevented the Union from

learning that Zimmer was performing painting work. On the basis of this alleged lack of "notice," the Arbitrator determined that all limitations and restrictions in both contracts on his decisional authority were "tolled" until "knowledge or information was received by the Union which would have the effect of putting the Union on notice." (R. 57-58.) Coincidentally and without further explanation, the Arbitrator then found that "[t]his knowledge was not received until the early part of 1966 when the grievance here under consideration was filed." (R. 58.)

Apart from the contractual limitations on the Arbitrator's authority discussed previously, and the obvious contractual misconstructions discussed below, it is sufficient answer to the Arbitrator's effort to "revisit" the old contract to point out, as the Arbitrator himself acknowledged in his decision, that from the very outset of the assignment the Union and, of course, Zimmer, were fully aware that he was engaged in painting work throughout the factory. Assuming _arguendo_ that the posting of a Painter job at the time of Mr. Zimmer's assignment, or shortly thereafter, would have given the Union notice of that assignment, it is inescapably true, as the Arbitrator himself found, that the Union had _actual_ notice of the painting work being performed by Zimmer from the outset of

his employment (R. 55). Furthermore, in his decision, the Arbitrator found that actual knowledge or information of Zimmer's painting activities would be sufficient to place the Union on notice of the Company's action. In view of the fact that the Union obviously had such notice throughout the period of Zimmer's employment, the Arbitrator's finding, without so much as a supporting sentence, that this actual notice was not received "until the early part of 1966 when the grievance here under consideration was filed" is totally inexplicable. It is obvious that the Union's knowledge on the subject in 1966 was no different from the knowledge which it had beginning with the assignment of Zimmer to painting work in 1964. In fact, there was no change in the Union's knowledge in 1966; the only change was a turnover in the officers of the Union when Mr. Neff replaced Mr. Duncan as the Local's president.

Although it may be difficult to understand why the Union chose not to invoke Section XVII-2 of the contract during this period, the fact remains that it obviously made such an election. For whatever its reasons may have been, the Union apparently decided that it would have a better opportunity to obtain a Painter classification in the negotiations for the new master contract that were to be held the following spring. Indeed, at these negotiations the demand for such a classification was supported, not only

[illegible]

by claims that painting work was being performed at Carlton, but also that two men were engaged full time in painting at the Santa Ana factory. That the Union was unsuccessful in its efforts to obtain a Painter classification in the current contract clearly does not furnish a basis for the establishment of such a classification under the prior contract but, on the contrary, further demonstrates the necessity for setting aside that aspect of the Arbitrator's award.

In short, it is clear from the face of the Arbitrator's opinion that the Union knew that Zimmer was performing painting work throughout his employment. Furthermore, the Arbitrator expressly found that such "knowledge or information" had "the effect of putting the union on notice" (R. 57-58). In these circumstances, the Arbitrator's conclusion that the contractual restrictions imposed on his authority were "tolled" is not only baseless but, indeed, totally inconsistent with his own analysis and decision.

Finally, we submit that the Arbitrator's ultimate determination that he had authority to award relief under the expired contract proceeds from an erroneous interpretation of the purpose and effect of Section VIII-G of the contract and from a misconception of the nature of any possible violation that may have resulted from the assignment of Zimmer to painting work, assuming arguendo that such a violation occurred. The purpose of Section VIII-G, set as it is in the

seniority provisions of the contract, is readily apparent. The section was designed to give notice to employees of vacancies in existing job classifications so that they might utilize their seniority standing and ability in an effort to obtain more favorable positions. This is not to say that the provision has no application where the assignment of substantial new duties may result in the creation of a new job. In this latter situation, however, Section VIII-G is clearly subservient to the requirements of Section XVII-2. Section XVII-2 provides:

> "New Jobs. In the event any new jobs are created, the work classifications and wage rates therefor shall be negotiated by the Employer and the Union, provided, however, should the parties fail to agree on the work classifications and wage rates for any such new jobs, the Employer shall have the right to fill such new jobs and fix the work classifications and wage rates therefore, subject to the Union's right to refer the matter of the work classifications and wage rates of such new jobs to normal grievance procedure." (R. 12 [33].)

It is thus manifest that, with respect to a newly created job, the posting requirements of Section VIII-G become operative only after the Company and the Union have, following negotiations, reached agreement upon a new work classification and wage rate or, absent agreement, the Company exercises its right under the provision to establish the appropriate classification and wage rate subject, of course, to the Union's correlative right to grieve about the

Company's action.

Here, of course, the Company believed, in good faith, that the assignment of painting work to Zimmer was consistent with the classification of Mechanic's Helper to which he had been assigned.[24] The Union apparently viewed the assignment quite differently. It was therefore, we submit, incumbent upon the Union to invoke Section XVII-2 and request the Company to negotiate concerning the establishment of a painter classification and an appropriate wage rate. If the Company had declined to meet with the Union about the matter, the Union was free to utilize the grievance and arbitration provisions of the contract to remedy such an obvious contract violation.

Assuming that the parties had negotiated about the matter pursuant to the provisions of Section XVII-2, but were unable to reach an accord, the Union was entitled under that Section to grieve and arbitrate about any adverse action by the Company. Here, as noted by the Arbitrator, although the Union was aware of Zimmer's work assignment, it never sought negotiations concerning the establishment of a painter classification nor did it resort to the grievance procedure

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24. As noted supra, painting work had traditionally been performed as an intercampaign maintenance task by year-round employees. Furthermore, Zimmer was assigned to other work in June 1966 when "the company had fairly well completed its painting program." (R. 53.)

set forth in the contract within the 30-day time limitation or indeed at any time during the remaining year of the contract. It is this failure, among others, of the Union to follow the requirements of the grievance procedure of the collective bargaining agreement which precluded the Arbitrator from hearing its claim on the merits and which requires the setting aside of the award by this Court.

In sum, it is clear that the Company's failure to post the fact that Zimmer had been assigned to painting work did not violate any notice or other provision of the contract. Indeed, the very assignment itself carried out, as the Arbitrator found, in an open and notorious fashion, constituted sifficient notice to the Union to enable it to invoke the provisions of Section XVII-2. This was the provision of the contract to which the Union should have resorted, if it believed, contrary to the Company's conclusion, that the tasks assigned to Zimmer had resulted in the creation of a "new job." The Union, however, failed to avail itself of this provision. Therefore it is clear that the Company's action violated neither Section VIII-G nor any other provision of the contract. In these circumstances, not only was there no basis upon which the Arbitrator could "revisit" the expired agreement, but, indeed, there was no justification for finding that the Company had violated any provision of that agreement.

In conclusion, we submit that the Arbitrator's award, at least to the extent that it requires the establishment under the present contract of an overall job classification covering painting work in general and, in effect, created such a classification under the prior contract well after its expiration, is in clear excess of the Arbitrator's authority under both contracts and must necessarily be set aside. This suit is not, as suggested by appellee below, an attack on the arbitral process. Nor would a decision by this Court granting the foregoing relief have a deleterious effect on labor arbitration. On the contrary as stated by Judge Lumbard in Torrington (362 F.2d at 682):

> "Far from having the disruptive effect upon the finality of labor arbitration which results when courts review the "merits" of a particular remedy devised by an arbitrator, we think that the limited review exercised here will stimulate voluntary resort to labor arbitration and thereby strengthen this important aspect of labor-management relations by guaranteeing to the parties to a collective bargaining agreement that they will find in the Arbitrator not a 'philosopher king' but one who will resolve their disputes within the framework of the agreement which they negotiated."

IV

CONCLUSION

For the foregoing reasons, it is respectfully submitted that a decree should issue reversing the judgment below and remanding the case to the District Court with instructions to set aside that segment of the Arbitrator's award relating to the establishment of an overall painter classification with respect to both the present and past collective bargaining agreements.

Dated: February 23, 1968.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 +39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ JAMES C. PARAS

James C. Paras

APPENDIX A

The following is a list of sixteen jobs found among the work classifications appearing in the current master contract showing the different pay rates which were assigned to such jobs at diffefent factories (R. 12 [38-73]):

Legend:
H = Holly Sugar Corporation
S = Spreckels Sugar Company
AC = American Crystal Sugar Company

	Job Title	Class	Plant	
1.	Liquid Sugar Operator (invert)	Tech B	Alvarado	H
	" " "	Tech A	Santa Ana	H
	Liquid Sugar Station Operator	Tech B	Spreckels	S
	" " " "	Sta. A	Manteca	S
	" " " "	Sta. A	Mendota	S
	" " " "	Sta. A	Woodland	S
	Liquid Sugar Operator	Sta. A	Tracy	H
2.	Oiler	Tech C	Manteca	S
	"	Tech C	Mendota	S
	"	Sta. A-1	Spreckels	S
	"	Sta. A	Alvarado	H
	"	Sta. A	Carlton	H
	"	Sta. A	Hamilton City	H
	"	Sta. A	Santa Ana	H
	First Oiler (pumps)	Sta. A	Clarksburg	AC
3.	Pulp Drier Operator	Tech A	Woodland	S
	" " "	Tech C	Manteca	S
	" " "	Tech C	Mendota	S
	Pulp Drier Fireman	Sta. A	Alvarado	H
	" " "	Sta. A	Carlton	H
	" " "	Sta. A	Santa Ana	H
	" " "	Sta. A	Tracy	H
	Drier Fireman	Tech C	Spreckels	S
4.	Warehouse Checker	Tech C	Manteca	S
	" "	Tech C	Woodland	S
	" "	Sta. A	Spreckels	S

	Job Title	Class	Plant	
5.	Assistant Electrician	Tech B	Clarksburg	AC
	" "	Tech C	Alvarado	H
	" "	Tech C	Tracy	H
	" "	Tech C	Carlton	H
6.	Shift Chemist	Tech A	Spreckels	S
	" "	Tech B	Manteca	S
	" "	Tech B	Mendota	S
	" "	Tech B	Woodland	S
7.	Evaporator & Instrument Controller	Tech C	Carlton	H
	Evaporator Operator	Sta. A-1	Spreckels	S
	Evaporator	Sta. A	Manteca	S
	"	Sta. A	Santa Ana	H
	"	Sta. A	Tracy	H
	"	Sta. A	Woodland	S
8.	Gardener	Sta. B	Spreckels	S
	"	Sta. B	Woodland	S
	"	Sta. C	Clarksburg	AC
9.	Granulator	Sta. A	Manteca	S
	Granulator Operator	Sta. B-1	Spreckels	S
	Granulator	Sta. B	Alvarado	H
	"	Sta. B	Carlton	H
	"	Sta. B	Clarksburg	AC
	"	Sta. B	Hamilton City	H
	"	Sta. B	Santa Ana	H
	"	Sta. B	Tracy	H
	"	Sta. B	Woodland	S
10.	Knife Setter	Sta. A	All Plants except	
	" "	Sta. B-1	Spreckels	S
	Knife Station Operator	Sta. A-1	Mendota	S
11.	Centrifugal Operator	Sta. A	All plants except	
	"	Tech C	Mendota	S
		none	Manteca	S
12.	Vacuum Pan Helper	Sta. A	Tracy	H
	"	Sta. B	Hamilton City	H
	"	Sta. B	Manteca	S
	"	Sta. B	Santa Ana	H

	Job Title	Class	Plant	
13.	Slackerman [Slakerman]	Sta. B	Manteca	S
	"	Sta. B	Spreckels	S
	"	Sta. C	Carlton	H
	"	Sta. C	Hamilton City	H
14.	Weightmaster	Sta. A	Manteca	S
	"	Sta. A	Mendota	S
	Beet Weightmaster	Sta. A	Woodland	S
	" " (Factory Rec.Sta.)	Sta. A	Spreckels	S
	Weightmaster	Sta. B	Clarksburg	AC
15.	Sugar Piler & Loader	Sta. B-1	All 5 Holly plants	H
	Piler & Loader (Sugar and Dried Pulp)	Sta. B	Manteca	S
	"	Sta. B	Mendota	S
	"	Sta. B	Woodland	S
16.	Truck Driver	Tech C	Manteca	S
	"	Tech C	Woodland	S
	Yard Truck Driver	Tech C	Mendota	S
	Tare Lab. Sample Truck Driver	Tech C	Mendota	S
	Truck Driver (Sugar)	Tech C	Carlton	H
	"	Tech C	Hamilton City	H
	"	Tech C	Santa Ana	H
	"	Tech C	Tracy	H
	Truck Driver	Sta. B	Clarksburg	AC
	"	Sta. B	Spreckels	S
	Supply Truck Driver	Sta. B	Alvarado	H
	"	Sta. B	Carlton	H
	"	Sta. B	Santa Ana	H
	"	Sta. B	Tracy	H
	Yard Truck Driver	Sta. C	Alvarado	H

SECTION XI. GRIEVANCE PROCEDURE:

A. Stewards and Workmen's Committee. The Union shall select such stewards as may be necessary to carry out the purposes of this Agreement. The Union shall select from it membership at each plant a committee of three to be known as the Workmen's Committee.

B. Grievances. Whenever any employee claims a grievance against Employer he shall notify the Workmen's Committee, which shall investigate the matter and report its findings to the Union. In the event the Union decides against the complainant the decision shall be final and binding, subject, however, to appeal to the Sugar Council and the International Union. In the event the Union, or, after appeal said Sugar Council or International Union, decides the grievance should be considered further, it shall be referred to the Grievance Committee. All grievances must be presented to Employer in writing, setting forth in detail the nature of the grievance and must be presented within thirty (30) days of the date of the alleged grievance. Otherwise said grievance will not be considered.

C. Grievance Committee. The Grievance Committee shall be composed of three (3) members selected by the Union and three (3) Employer members appointed by Employer. The Grievance Committee shall be empowered to adjust only those grievances of Union, members of the Union and Employer which arise and are presented during the term of this contract and which concern the interpretation or application of any of the terms or provisions of this contract in the manner hereinafter set forth.

D. Procedure. The Grievance Committee upon receiving notice that a grievance is to be submitted to it shall meet within three (3) days' time. Said committee shall make every effort to settle within five (5) days from the date of submission of each such grievance. Either the Union or Employer may, after exhausting the foregoing grievance procedure, submit any unresolved grievance which arose and was presented during the term of this contract and which concerns the interpretation and application of any of the terms or provisions of this contract to an arbitrator for decision in accordance with the following procedure:

There is hereby established a permanent panel of five impartial arbitrators; namely ______________________

______________________, ______________________, ______________________
and ______________________. In any case, when the Union or Employer refers to arbitration an unresolved grievance which was presented in accordance with the above procedure, the arbitrator who shall hear such grievance shall be selected by lot from the foregoing panel. The decision of the arbitrator shall be in writing and shall be final and binding upon both parties. The expenses of arbitration shall be shared equally between the Union and Employer.

It is understood and agreed, however, that proposals to add to or change this contract shall not be arbitrable and that no proposal to modify, amend or terminate this contract may be referred for arbitration under this Section; and no arbitrator shall have any power to amend or modify this contract, except that in the event new jobs are created, the arbitrator shall in such event have the power to act as provided in Section XVII, subparagraph 2, of this contract.

E. Union Representatives. The Shop Steward, or Workmen's Committee, or Union representatives of the Grievance Committee, shall have the right to converse with employees while on the job, but no time shall thereby be unnecessarily lost to the Employer. Any other duly authorized representative of the Union, upon applying to the superintendent's office, shall be allowed a pass entitling him to check with members of the Workmen's Committee on the job at reasonable times for the purpose of investigating the performance of this agreement. This privilege shall be exercised so that no time is lost to the Employer. Any such pass shall cover one trip only at the specified time and must be surrendered upon completion of the trip. Any abuse of this privilege shall result in its being withdrawn by the Employer.

No. 22,152

IN THE

United States Court of Appeals

For the Ninth Circuit

Holly Sugar Corporation,
Appellant,

vs.

Distillery, Rectifying, Wine and Allied Workers International Union, AFL-CIO, et al.,
Appellees.

On Appeal from an Order of the United States District Court for the Northern District of California

REPLY BRIEF FOR APPELLEES

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Table of Authorities Cited

Codes

Statutes

[illegible]

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REPLY BRIEF FOR APPELLEES

STATEMENT OF THE CASE

This case is before the Court as the result of a complaint filed with the Court below by the Appellant, Holly Sugar Corporation, to "vacate, modify or correct an arbitration award" and subsequent cross motions by both the Appellant and Appellees to vacate and confirm the award, respectively. On July 6, 1967, District Judge Lloyd H. Burke, after reviewing the briefs filed by the parties and after hearing oral argument, denied appellant's motion and ordered that the Appellees' motion to confirm the arbitrator's

award be granted. The Court then issued a judgment dismissing the complaint and confirming the Award (R. Vol. 2, p. 148).

The Record before the Court below shows that on July 12, 13, and 29, 1966, arbitration hearings were held before Arbitrator Robert E. Burns, pursuant to the provisions of collective bargaining agreements between the parties. The numerous issues involved in these arbitration proceedings basically concerned the proper work classification and wage rate for one of the appellant's employees named Harold M. Zimmer (hereinafter sometimes referred to as the grievant). Subsequent to the arbitration hearings concurrent and comprehensive opening briefs were filed with the arbitrator by both the appellant herein (sometimes hereinafter called the Employer) and the appellees (sometimes hereinafter called the Union), (R. Vol. 2, p. 12), and equally comprehensive reply briefs followed. Arbitrator Burns rendered his award on January 23, 1967 (R. Vol. 1, p. 47). The Company thereafter submitted to the arbitrator what it termed a "Motion For Vacation of Opinion and Award", to which the Unions responded. On April 3, 1967, the arbitrator rejected the company's contentions and denied its motion (R. Vol. 2, p. 71). The Company's complaint and motion to the United States District Court was filed on April 18, 1967.

The parties involved in this case, together with the Spreckels Sugar Company and the American Crystal Sugar Company, have been involved in a continuous collective bargaining relationship for many years. In

the Spring of every third year their collective bargaining agreement is customarily renegotiated, as it was in 1962 and 1965. The body of the contract between the Unions and the three sugar companies is identical, with variations negotiated concerning certain classifications and certain other minor differences.

The contract language concerning arbitration procedures, and the establishment and posting of new jobs, applies alike to all the companies and unions parties thereto. A permanent panel of arbitrators is established to hear and resolve disputes between the parties. Arbitrator Burns has long been a member of this panel, having been included in the 1962 contract and the 1965 contract.

The instant matter which eventually went before Arbitrator Burns in three days of hearings, hundreds of pages of transcript testimony, and briefed argument, originated on March 3, 1964. The nature of this dispute will be briefly summarized. Harold Zimmer, looking for a job, visited R. B. Scanlon, factory superintendent of the appellant's Brawley, California sugar plant (sometimes referred to as Carlton). (Arb. Tr. p. 28.)[1] Zimmer was a journeyman painter, and it so happened that factory manager Scanlan was at that time looking for a full-time painter. Scanlan had already made up his mind to hire someone solely for painting purposes. He had decided that he could no longer release his employees from their other re-

[1] "Arb. Tr." references herein are to the Arbitration Transcript lodged with the Court as an Exhibit.

sponsibilities for painting purposes (Arb. Tr. p. 29, p. 92).

The Spreckels Sugar Company factories had a painter classification included in the listing of classifications in the 1962 contract. However, Holly Sugar Company factories did not. Nevertheless, the collective bargaining agreement contained provisions for the creation of new jobs and the posting thereof (1962 contract, Section XVII(2), R. Vol. 1, p. 29).

The Holly practice had been, prior to March, 1964, to have the painting work done during "intercampaign", the off season (Arb. Tr. p. 92). Painting work during that time was done by other factory personnel available for such work, and ordinarily not done during the campaign season when sugar beets were being harvested and processed, and the sugar plants were in around the clock operation.

Departing from this practice, Zimmer was hired by Scanlan for the exclusive purpose of painting (Arb. Tr. p. 29). For the next two years Zimmer did nothing but paint (Arb. Tr. pp. 30, 31), during campaign as well as intercampaign.

The Company Superintendent Scanlan never told the Union nor, apparently, his own superiors, that he had a full-time painter (Arb. Tr. p. 118). Even after the succeeding collective bargaining agreement in 1965 was signed, Zimmer's work was charged to various expense accounts other than painting. From Company records there was no way in which it could be determined that Zimmer was, in fact, a full-time painter (Arb. Tr. pp. 102, 176). Moreover, before

Arbitrator Burns Scanlan testified that he "could not recall" whether the job of Mechanic's Helper, the classification technically assigned to Zimmer, had ever been posted as required by Section VIII(G) of the contract (Arb. Tr. p. 116). When Scanlan was asked prior to collective bargaining negotiations in 1965 to submit a list of active classifications he submitted a list but the list did not include a painter, or, indeed, any classification which could identify the fact that Zimmer was assigned exclusively to painting work (Arb. Tr. p. 118).

In the negotiations for the 1965 contract, the Union submitted its new contract proposals including a proposal initiated by the Holly Sugar Company Santa Ana Local Union for a painter classification (Arb. Tr. p. 184). The Santa Ana local had become concerned because beginning in December, 1964, during intercampaign, two men normally assigned to the "Station A" classification had been assigned on a full-time basis to painting responsibilities (Arb. Tr. pp. 184, 185). The Santa Ana proposal sought to add the classification of painter with a "Technician A" rate (Arb. Tr. p. 185), a higher paid classification applicable largely to skilled craftsmen.

A subcommittee of local Union and Company representatives met on March 11, 1965, to discuss the proposed classification (Arb. Tr. p. 185). Vice-President Guy Rorabaugh, acting as spokesman for the Company, contended that painting was only an intermittent "catch-up" job, and did not constitute full-time work for anyone (Arb. Tr. p. 187). Rorabaugh

represented to the Union that the Company had no full-time painters (Arb. Tr. p. 187). Rorabaugh further stated that he objected to the Union's painter classification proposal because he did not want any jobs that weren't being filled (Arb. Tr. pp. 188, 200, 211). At the very time Rorabaugh made these representations the Company had Zimmer in its employ as a full-time painter at its Brawley plant without the Union's knowledge. In this context both the painter classification proposal made by the Union and the spray painter classification proposal made by Rorabaugh at the subcommittee meeting were taken to the main bargaining table. Here the painter proposal was dropped by the Union in reliance on Rorabaugh's representations, and the spray painter proposal was adopted (Arb. Tr. p. 198).

During the subcommittee discussion of Rorabaugh's counter proposal for a spray gun painter there was also discussion about just what work would be included in such a classification. Aside from actually handling the spray gun Rorabaugh agreed that there was also time involved in preparing, cleaning and taking care of the spray rig (Arb. Tr. p. 202). He agreed that the normal duties of a spray gun painter would be included in this classification (Arb. Tr. p. 209). According to this understanding, employees at the Company's Santa Ana plant occupying the painter (spray gun only) classification are paid for preparation and cleaning, as well as actual operation of the spray gun equipment (Arb. Tr. p. 190). In addition, Santa Ana employees are paid the rate of the spray

gun painter classification for the entire week whenever they perform the duties of that classification for a substantial part of a week (Arb. Tr. p. 190). This procedure is also followed at the Company's Hamilton City plant (Arb. Tr. p. 215). On the other hand, at the Brawley plant, where the instant dispute arose, the grievant (Zimmer) who had spent 65% of his time preparing and spraying (Arb. Tr. p. 34), had been paid the painter (spray gun only) classification rate only while he was actually handling the spray gun, and not while he was preparing, burning or scraping (Arb. Tr. pp. 97, 112).

Shortly after a new local Union president had been elected at Brawley in January 1966 he was presented with a variety of grievances. Included was a grievance by Zimmer claiming he was not receiving adequate pay (Arb. Tr. p. 84). The new Union president discovered for the first time that Zimmer had never done anything except paint and prepare surfaces for painting (Arb. Tr. p. 85). A grievance on behalf of Zimmer was filed by the chairman of the local union grievance committee, complaining of a variety of contractual violations, but specifically that Zimmer was misclassified:

> It is the contention of this Union that, the assignment of the position of mechanics helper does not, in any way, reflect the true classification that should presently be assigned to the incumbent painter. (R. Vol. 1, p. 46).

At the grievance committee meeting which followed, the Union argued that a painter classification should

be posted and filled since it was now clear that Zimmer was working as a painter during all of his working hours (Arb. Tr. p. 115). The Company contended that it has "no grounds" for filling a painter classification (Arb. Tr. pp. 115, 119).

With certain exceptions to be discussed later, the issues presented to this Court by the appellant were the same issues presented to the Arbitrator at the hearing, argued thereafter by the parties, and decided by the Arbitrator. The Union raised the issue that the Company had unilaterally established a new job of painter and was bound under the provisions of Section XVII(2) of the collective bargaining agreement to either negotiate or arbitrate the proper work classification and wage rate for the job performed by Zimmer. Section XVII(2) was first included in the 1962 collective bargaining agreement, and continued in the 1965 agreement. It provides as follows:

> In the event any new jobs are created, the work classifications and wage rates therefor shall be negotiated by the Employer and the Union, provided, however, should the parties fail to agree on the work classifications and wage rates for any such new jobs, the Employer shall have the right to fill such new jobs and fix the work classifications and wage rates therefor, *subject to the Union's right to refer the matter of the work classifications and wage rates of such new jobs to normal grievance procedure.* (R. Vol. 1, pp. 12, 29; emphasis supplied).

The Union also raised the issue that the new classification of "Painter (spray gun only)" under the 1965

contract was being incorrectly applied at the Brawley plant. The Union maintained that the Company had the obligation to post and fill this new classification because Zimmer was spending most of his time working as a spray gun painter. It was the Union's position that since Zimmer was working as a spray painter during a substantial majority of his working hours, he should be compensated as a spray painter, on a full-time basis.

Not once, prior to the arbitration hearing did the Company urge, as appellant now argues to this Court, either (1) that the 30 day proviso in Section XI(B) was applicable to preclude arbitration; or (2) that any claim for work performed under the 1962 collective bargaining agreement could no longer by processed through arbitration because that agreement had expired and had been superseded by the 1965 collective bargaining agreement. Indeed, it is quite clear that the Company's position prior to arbitration was not that the grievance was in any way untimely, but only that a "painter classification" had been "rejected" at the 1965 negotiations (Arb. Tr. pp. 150-151).

At the arbitration hearing, in addition to the contention that a painter classification had been rejected at the 1965 negotiations, and therefore could not be "added to the contract", counsel for the Company also belatedly added the issue of timeliness and presented these issues to the arbitrator at the hearing. It was also argued that if the Company had added a new job of painter in 1964, that it no longer could be considered a "new job", but now had the status of an "old

job".[2] Finally, counsel for the Company raised and submitted to the arbitrator for his determination the broad question of arbitrability.

At the arbitration hearing the Company asked the arbitrator to determine his own jurisdiction, and then decide the case on the merits. The Union agreed to submit the question of arbitrability to the arbitrator, but a conflict between the parties arose as to when the arbitrator should render his determination on the arbitrability question. Arbitrator Burns felt that he could not render a decision on that question without hearing evidence. Counsel for the Company "for the record" objected, but agreed that the arbitrator should have the *power* to rule on the question of arbitrability (Arb. Tr. p. 21, lines 16-26; p. 22, lines 1-10; p. 23, lines 19-24).

In his opinion and award, Arbitrator Burns found that since 1964 Zimmer had devoted himself exclusively to painting (R. Vol. 1, p. 56). He also found that the Company established a new job when it hired Zimmer in 1964, and was obligated under the terms of Article XVII(2) of the 1962 contract (quoted infra p. 8, as well as under Article VIII-G to post the new job and to negotiate and bargain with the Union as to an applicable wage rate (R. Vol. 1, p. 56). He held that the Company violated Section VIII-G of the 1962 contract, by failing to provide the Union with notice prior to the filling of the job. Thus, since the Company had failed to meet its obligations under the

[2]The Company has evidently abandoned this issue in the presentation of its appeal.

contract, the time limitations contained in the contracts had been tolled (R. Vol. 1, pp. 57, 58). The arbitrator also found the grievance to be continuing, thus rendering the contract time limitations inapplicable, but because the Company had not complied with the contract he believed it was not necessary to base the decision on this ground.

Arbitrator Burns went on to hold that although the 1962 contract had been superseded by a new contract, there was no bar in the contract or in law or equity to prevent the consideration of claims under an expired contract in such circumstances as existed in this case (R. Vol. 1, p. 58).

Arbitrator Burns then resolved the remaining issue before him. He held that the "Painter (spray gun only)" classification established by the 1965 contract must be considered to have the content and scope of duties normally attributed to that job and the trade in which that job falls. He found that the new classification included the preparing of surfaces by way of brushing and cleaning, as it is a normal part of the responsibility of a painter, whether he sprays, brushes or rolls the surface with a protective coating. The arbitrator decided that there was nothing in the agreement or the record before him to indicate that these normal duties were intended to be excluded from the classification "Painter (spray gun only)" (R. Vol. 1, p. 60).

Arbitrator Burns then concluded that pursuant to his powers under Section XVII-2 of the contract Zimmer should receive pay in the classification of

Technician A from the time he was employed in 1964 and for the entire period while he worked either as a painter or as a spray gun painter.

ARGUMENT

I.

THE LAW AND COURT DECISIONS APPLICABLE TO THE ENFORCEMENT OF ARBITRATION AWARDS ARISING UNDER SECTION 301 OF THE LMRA (29 U.S.C.A. § 185(a)) REQUIRES THAT THIS APPEAL BE DISMISSED.

As is now well established, the authority of the federal courts to compel arbitration, to confirm arbitration awards, and their limited authority to vacate such awards, is derived from Section 301(a) of the Labor-Management Relations Act, 1947, 61 Stat. 156, 29 U.S.C.A. § 185(a), and the interpretation thereof by the United States Supreme Court. *Textile Workers Union v. Lincoln Mills,* 353 U.S. 448, 1 Law Ed. 2d 972, 77 Supreme Court 912; *United Steelworkers of America v. Warrior and Gulf Nav. Co.,* 363 U.S. 574, 4 L. Ed. 2d 1409, 80 S. Ct. 1347; *United Steelworkers v. American Mfg. Co.,* 363 U.S. 564, 4 L. Ed. 2d 1403, 80 S. Ct. 1343; *United Steelworkers v. Enterprise Wheel and Car Corp.,* 363 U.S. 593, 4 L. Ed. 2d 1424, 80 S. Ct. 1358.

The Appellant argues that this Court should entertain an in depth review of arbitration proceedings. In *United Steelworkers v. Enterprise Wheel, supra,* the Supreme Court specifically rejected such a review. In so doing, the Court reversed a Court of Appeals de-

cision and reaffirmed an arbitrator's award, requiring reinstatement and back pay for discharged employees, subsequent to the termination of a collective bargaining agreement. The decision of the Court included the following analysis of its role and that of the arbitrator in the collective bargaining situation:

> *The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements. The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards.* As we stated in *United Steelworkers of America v. Warrior & Gulf Navigation Co.,* 363 U.S. 574, 4 L. Ed. 2d 1409, 80 S. Ct. 1347, decided this day, the arbitrators under these collective agreements are indispensable agencies in a continuous collective bargaining process. They sit to settle disputes at the plant level—disputes that require for their solution knowledge of the custom and practices of a particular factory or of a particular industry as reflected in particular agreements.
>
> When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide variety of situations. (*Enterprise Corp., supra,* 363 U.S. 596, 597; emphasis supplied.)

As is the case with the appellant here, all too often a party seeking to avoid the unfavorable results of a

labor arbitration award will emphasize language in the *Enterprise* opinion, stating:

> ". . . the award is legitimate only so long as it draws its *essence* from the collective bargaining agreement. When the Arbitrator's words *manifest* an *infidelity to this obligation,* courts have no choice but to refuse enforcement of the award." (*Enterprise Corp., supra,* 363 U.S. 596, 597; emphasis supplied.)

The quotation of this language for the purpose of attacking the merits of an award is a misapplication of the true purpose of the trilogy decisions, which purpose is abundantly clear on careful reading. The *Steelworkers* trilogy decisions call upon the arbitrator to apply his specialized knowledge to the unexpected situation, which, not surprisingly, is the rule rather than the exception in labor relations. The courts have made it plain that the Arbitrator's "fidelity to his obligation" is always fully met so long as the arbitrator does not act in a clearly arbitrary or capricious manner in rendering an award which manifestly goes beyond his authority under the broad confines of the collective bargaining agreement. This is the true *essence* of the national labor policy as construed by the courts in considering labor arbitration agreements and awards. Scores of decisions have followed the trilogy cases discussing, reaffirming, and only in a very few instances, reassessing the court's involvement.

One of the issues raised by the appellant concerns alleged procedural irregularities in bringing this dis-

pute to arbitration. In case after case the courts have ruled that questions of compliance with the contract grievance procedures are to be exclusively determined by the arbitrator. *U.A.W. v. Daniel Radiator Corp. of Texas* (CA-5; 1964) 328 F. 2d 614; *AVCO Corp. Electronics and Ordnance Division v. Mitchell* (CA-6; 1964) 336 F. 2d 289; *Local 748, etc. v. Jefferson City Cabinet Co.* (CA-6; 1963) 314 F. 2d 192, cert. den. 377 U.S. 904, 84 S. Ct. 1162, 12 L. Ed. 2d 175; and *Livingston v. John Wiley & Sons* (CA-2; 1963) 313 F. 2d 52, aff'd 376 U.S. 543, 84 S. Ct. 909, 11 L. Ed. 2d 898.

The Supreme Court's opinion in *Livingston v. John Wiley & Sons, supra,* is particularly appropriate in view of the issue of contract time provisions raised by the appellant in these proceedings.

> "We think that labor disputes of the kind involved here cannot be broken down so easily into their 'substantive' and 'procedural' aspects. Questions concerning the procedural prerequisites to arbitration do not arise in a vacuum; they develop in the context of an actual dispute about the rights of the parties to the contract or those covered by it.
>
> . . . .
>
> "Reservation of 'procedural' issues for the courts would thus not only create the difficult task of separating related issues, but would also produce frequent duplication of effort." [14 L. Ed. 2d 909.] *Livingston v. Wiley, supra,* at p. 558.
>
> . . . .
>
> "We think it best accords with the usual purposes of an arbitration clause and with the policy be-

> hind federal labor law to regard procedural disagreements not as separate disputes, but as aspects of the dispute which called the grievance procedures into play." *Livingston v. Wiley, supra,* at p. 559.

The courts have further held that the question of arbitrability itself when submitted to the arbitrator is normally a question which the arbitrator has the responsibility to decide. *Local 24 (IBEW) v. Bloom & Co.* (D.C. Md.; 1965) 242 F. Supp. 421. In *Local Lodge No. 595 of District No. 152 v. Howe Sound Co., Inc.* (CA-3; 1965) 350 F. 2d 508, the Court held that the question of holiday pay which accrued and was payable after the expiration of the collective bargaining agreement, was a matter to be determined by the arbitrator alone. Similarly, in *Piano and Musical Instrument Workers Union v. Kimball Co.* (No. Dist. Ill.) 221 F. Supp. 461; (reversed 333 F. 2d 761; cert. granted and judgment on appeal reversed, 379 U.S. 357), the Court held that questions of seniority and hiring provisions which arose after a contract had expired were arbitrable.

A similar result was also reached in *Monroe Sander Corp. v. Livingston* (CA-2; May, 1967) 377 F. 2d 6, cert. den. 389 U.S. 831, where the Court held that questions concerning the shut-down and transfer of plant operations to a new plant not directly owned by the defendant company were arbitrable, although the collective bargaining agreement had expired.

In *Local 7-644 Oil. Chem. & Atomic Int. Union, AFL-CIO v. Mobil Oil Co.* (CA-7; 1965) 350 F. 2d

708, the Court held that questions concerning vacation benefits which arose during an extended six months strike, but prior to the execution of a new contract, were arbitrable. The Seventh Circuit Court of Appeals went on to say:

> "The District Court erred in considering afresh the merits of the dispute submitted for arbitration. Even though we might disagree with the arbitrator's decision if we were to examine the merits of the dispute, there is nothing in the record to indicate that the award was arbitrary or that the arbitrator exceeded his authority." *Local 7-644 v. Mobil Oil Co., supra,* at pp. 711-712.

This Court has also had occasion to discuss the question of proper judicial involvement after an arbitration award has been rendered.

In *Ficek v. So. Pac. Co.* (CA-9; 1964) 338 F. 2d 655, the plaintiff employee, as an individual, sued the Southern Pacific Company for a breach of an employment contract. The Company had promised to reinstate the employee if he underwent back surgery, which he did. Following the back surgery, and following the certification of his physical fitness, the Company refused to return the claimant to work. The matter was submitted to arbitration and the employee lost. This Court affirmed the trial Court's order granting the company's motion for summary judgment on the grounds that the arbitration award was "final and binding upon both parties to the dispute". The Court went on to discuss its powers in overturning final and binding arbitration awards:

> Ficek relies upon the statement in *Bower v. Eastern Airlines,* 214 F. 2d 623, 626 (3rd Cir. 1954), that "the essential fairness" of the arbitration proceeding is subject to judicial examination. But this means only that the court may decline to recognize an award if the arbitration proceeding does not meet minimal requirements of fairness—notice, "a full and fair hearing", and a decision based on the "honest judgment" of the arbitrators. It does not mean that the award may be examined for "alleged mistakes of law and erroneous evaluation of evidence". 214 F. 2d at 626-627. In effect, Ficek asks the court to review the substantive fairness of the award on the merits. That the court may not do. *United Steelworkers v. Enterprise Wheel & Car Corp.,* 363 U.S. 593, 596, 80 S. Ct. 1358, 4 L. Ed. 2d 1424 (1960)." *Ficek v. Southern Pacific Company, supra,* at p. 657.

The case of *American Radiator & Stand. San. Corp. v. Local 7 of the International Bro. of Operative Potters* (CA-6; 1966) 358 F. 2d 455, is particularly relevant here because of the appellant's contention that the creation of a new job was strictly a prerogative of management, and therefore not arbitrable. The Court disagreed, and ordered arbitration.

> "It is not the province of the courts to determine issues of fact which bear upon the questions of whether a particular section of the contract has been violated. This is the function of the arbitrator. *United Steelworkers of America v. American Manufacturing Co.,* 363 U.S. 564, 80 S. Ct. 1343, 4 L. Ed. 2d 1403. It is therefore our opinion that the question of whether new jobs have been

> created is an issue of fact which bears upon the issue of whether there has been a contract violation as charged by the union."

The United States Supreme Court in its holding in *Lincoln Mills, supra,* that Section 301(a) of the LMRA required the courts to enforce arbitration under collective bargaining agreements declared that it was the duty of the courts "to fashion a body of federal law" in implementation of this holding. Since then both the various state courts and the federal courts have been endeavoring to comply with this injunction. In so doing it is becoming increasingly clear that the courts are turning for assistance to the law of the forum.

Many states, including California where this case arose, have statutes governing arbitration which severely limit judicial review. The California statute on arbitration is similar to statutes found in most jurisdictions, as well as being almost identical to the language of the United States Arbitration Act (9 U.S.C. § 10). The California Code of Civil Procedure requires that an arbitration award may be vacated only under the following limited circumstances:

> "CCP 1286.2.
>
> Subject to Section 1286.4, the court shall vacate the award if the court determines that:
>
> (a) The award was procured by corruption, fraud or other undue means;
>
> (b) There was corruption in any of the arbitrators;

(c) The rights of such party were substantially prejudiced by misconduct of a neutral arbitrator;

(d) The arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted; or

(e) The rights of such party were substantially prejudiced by the refusal of the arbitrators to postpone the hearing upon sufficient cause being shown therefor or by the refusal of the arbitrators to hear evidence material to the controversy or by other conduct of the arbitrators contrary to the provisions of this title. (Added Stats. 1961, c. 461, p. 1546, § 2.)

The California courts have long recognized the statutory restrictions on the review of arbitration awards and they have exercised their limited jurisdiction with extreme caution. Among the leading California cases are the following: *Sapp v. Barenfeld,* 34 C. 2d 515; *Pacific Vegetable Oil Corp. v. C.S.T. Ltd.,* 29 C. 2d 228; *Loving & Evans v. Blick,* 33 C. 2d 603; *Crofoot v. Blair Holdings Corp.,* 119 C.A. 2d 156; *L.A. Joint Executive Board of Culinary Workers & Bartenders v. Stan's Drive-Ins, Inc.,* 136 C.A. 2d 89; *O'Malley v. Petroleum Maintenance Co.,* 48 C. 2d 107; *Atlas Floor Covering v. Crescent House & Garden, Inc.,* 166 C.A. 2d 211; *Ulene v. Millman (Murray) of Calif., Inc.,* 175 C.A. 2d 655; *Grunwald-Marx, Inc. v. Los Angeles Joint Board* (1959) 52 C. 2d 568; *Turner v. Cox,* 196 C.A. 2d 596; *Interinsurance Exchange v. Bailes,* 219 C.A. 2d 834.

Since the Supreme Court decisions in *Lincoln Mills* and the *Steelworkers* trilogy, California has recognized that federal law under Section 301(a) of the LMRA is applicable to arbitration under collective bargaining agreements between parties in industries affecting interstate commerce. In applying that law at least one California court has already held that the statutory procedures for arbitration provided for in California law are compatible with the federal labor policy under Section 301(a). *Laufman v. Hall-Mack Co.,* 215 C.A. 2d 87. Other states have also followed this view. A recent decision emanating from the Supreme Court of Minnesota also holds that its state arbitration act is consistent with substantive principles of federal labor law and should be applied to the enforcement of all awards. *Fischer, et al. v. Guaranteed Concrete Co.* (May 19, 1967) CCH Lab. Cases, ¶11,933, p. 19,074, at 19,076.

The United States Supreme Court has also recently applied state statutory procedural law in connection with enforcement of arbitration agreements governed by Section 301(a) of the LMRA. In *U.A.W. v. Hoosier Cardinal Corp.,* 383 U.S. 696 (1966) the Supreme Court found an Indiana statute of limitations applicable to LMRA Section 301 suits. The Court stated:

> "Accordingly since no federal provision governs we hold that the timeliness of a Section 301 suit such as the present one is to be determined, as a matter of federal law, by reference to the appropriate state statute of limitations." *U.A.W. v. Hoosier Cardinal Corp., supra,* at pp. 696-697.

As the Supreme Court pointed out, no federal statutory provisions govern the consideration of arbitration agreements and arbitration awards arising under LMRA Section 301(a). It is respectfully suggested that in exercising its duty to fashion a body of law for this purpose, this Court has in the California arbitration statute quoted above a ready and compatible source for the development of such law in this jurisdiction in connection with the review of arbitration awards governed by LMRA Section 301(a). Consistency of judicial enforcement and the desirable objective of settled law is well served by application of the law of the forum in both the state and federal courts.

To the extent that the appellant here urges a broad or exhaustive judicial review, we submit that appellant would be foreclosed by the California statute, and the court decisions in California arising thereunder, were it to move to vacate this award in the California courts. No case in any jurisdiction, to our knowledge, holds that the appellant should receive more highly favored treatment or have a lesser burden in the federal courts than is available to it under the state arbitration statute.

II.

APPELLANT HAS FAILED TO ESTABLISH ANY BASIS IN LAW OR FACT FOR A JUDICIAL VACATION OF THE ARBITRATOR'S AWARD HEREIN.

The appellant seeks to prevail upon this Court to overturn the arbitration award on the grounds that the grievance filed was not within the 30 day limita-

tion contained in the contracts. As already noted, application of the 30 day limitation is a question of procedural arbitrability, and all procedural questions are solely for the arbitrator's determination (see *Wiley v. Livingston,* and other cases cited *supra*). The arbitrator, of course, carefully considered the applicability of the 30 day limitation. He found that the Company had violated both the 1962 contract and the 1965 contract by failing to notify the Union of the establishment of the new painter classification and that the time limitations were, therefore, tolled. This was manifestly a fair and reasonable interpretation of the contract, and it was beyond any question within the arbitrator's powers to so decide.

The Union argued during the arbitration that the Company's procedural defenses could have been disposed of by the arbitrator on the grounds of waiver. Ample evidence in the arbitration record supported the proposition that the Company had waived the 30 day limitation by failing to raise it during the grievance committee meetings (Arb. Tr. pp. 150-151). Arbitration authority would have supported such a decision on waiver grounds. See: *Walter Refractories, Inc.,* 22 LA 775; *Cherry Growers, Inc.,* 24 LA 232; *Kroger Co.,* 24 LA 573; *McLouth Steel Corp.,* 24 LA 761; *American Smelting & Refining Co.,* 24 LA 857; *Flexonics Corp.,* 24 LA 869; *Denver Post,* 41 LA 200.

The Union also argued the principle of "continuing grievances." Labor arbitrators and the courts have long recognized that continuing violations of collective bargaining agreements are arbitrable on their

merits, regardless of time limitations for filing grievances under the contract. *Livingston v. Wiley, supra.*

Numerous arbitration decisions have supported this view: *Sargent Engineering Corp.,* 43 LA 1157; *Steel Warehouse Co., Inc.,* 45 LA 357; *Avco Corporation,* 43 LA 765; *Bethlehem Steel Co.,* 33 LA 324; *Paragon Bridge & Steel Co.,* 35 LA 572; *U.S. Potash Co.,* 37 LA 442; *ACF Industries,* 38 LA 14; *Copolymer Rubber & Chemical Corp.,* 40 LA 923.

The Union also urged the well-recognized concept of estoppel. Factory Superintendent Scanlan went out of his way to prevent the Union from learning of the new job that he had established. The Union was never notified and payroll records failed to indicate that Zimmer was a full-time painter. During the 1965 negotiations when the Union asked the Company to submit a list of active classifications, the other factory managers complied, but Scanlan failed to list the grievant Zimmer as a painter. Then, finally, during the 1965 negotiations when a full-time painter classification was squarely in issue, the Company negotiators misrepresented the situation by telling the Union that it had no full-time painters, and no need for any.

Thus, the arbitrator had several sound bases upon which to determine that the time limitations contained in the contract were not a valid defense to the grievance charged. The arbitrator chose to conclude that the Company's failure to notify the Union of the establishment of a new classification was a condition precedent to the assertion of the limitation defense.

> "Since the Company failed to comply with its obligations under the 1962 contract which would have had the effect of putting the Union on notice of the employment of Zimmer and the establishment of a job that consisted exclusively of painting and work in connection with painting, the 30 day limitation of both the 1962 and the 1965 contracts was tolled until knowledge or information was received by the Union which would have the effect of putting the Union on notice. This knowledge was not received until the early part of 1966, when the grievance here under consideration was filed." (R. Vol. 1, pp. 57, 58.)

This, of course, is the crux of the dispute between the Company and the Union, the merits of which were determined by the arbitrator. The Company contended that it has no obligation to inform anybody when it establishes a new job. Its peculiar theory is that if a new job is instituted and remains in existence for more than thirty days it can retain the new job with a *unilaterally* assigned wage rate *ad infinitum*. Indeed, after the passing of 30 days the Company euphemistically characterizes new jobs as "old jobs". The arbitrator had exclusive authority to determine this issue on its merits and did so. Nevertheless, the appellant now seeks to have this Court reverse the arbitrator.

In 1964, Brawley factory manager Scanlan, for reasons best known to himself, chose to violate *specific contractual provisions* concerning new jobs, hired a journeyman painter to do nothing but paint and classified him as a "Mechanic's Helper". Scanlan

acted secretly to enter into an illegal individual contract with a man in need of a job. There has never been any serious question that the assigned Mechanic's Helper classification was a patent violation of the agreement, and the arbitrator so found. Scanlan's action when he hired Zimmer in 1964 and his behavior thereafter constituted active concealment.

Arbitrator Burns could not ignore Scanlan's patent violation or the secrecy involved. With full knowledge of the entire circumstances, Arbitrator Burns thus ruled that the grievance time limitations of Section XI of the 1962 contract were tolled until the Union had been fairly apprised of these circumstances. Despite all of the overwhelming evidence that Scanlan's entire course of conduct constituted clear concealment, the Company still urges this Court to conclude that Arbitrator Burns' award was "baseless" and "inconsistent" since on page 9 of his award Arbitrator Burns observed:

> "There is evidence that prior to and during the 1965 negotiations Union representatives observed Zimmer performing painting work. It is clear that much of his work was in full view of other employees or any observer." (R. Vol. 1, p. 55.)

It should be noted that the above statement was in the section of the arbitrator's award entitled "Review of the Evidence". At the end of this section the arbitrator states that other evidentiary matters are mentioned in his opinion. In his opinion the arbitrator makes a specific finding that the Company failed to notify the Union of the creation of this job and that

it failed to post the job, all in violation of Sections XVII-2 and VIII-G of the 1962 contract.

It is important to point out that Arbitrator Burns did not conclude and did not find that before the grievance was filed the Union had notice of the scope and character of Zimmer's painting activities. In their opening brief, counsel for the Company have continuously misstated the arbitrator's finding in this regard.

It is true there was some evidence that Zimmer had been observed doing painting work by some persons, but it is also clear from the record that all "mechanic's helpers" on some occasions did some painting work. There is no evidence in the record that any Union representatives knew that Zimmer was performing painting work *exclusively,* and no such finding could have been supported. Nor did Arbitrator Burns indicate that the fact that Zimmer's work was "in full view of other employees" in any way offset the Company's obligation to notify the Union and post the newly established job. Plainly, the arbitrator's award was entirely reasonable and represented his honest judgment after a careful review of all of the evidence.

For the first time the Company, in this appeal, has added an additional argument concerning the relationship between Sections VIII-G and XVII-2 of the contract. Their contention is that the notice and posting requirements of Section VIII-G are subservient to Section XVII-2. It is now the Company's belated contention to this Court that there is never an obligation

to notice and post a new job created under Section XVII-2. Aside from the fact that this is a novel proposition never presented to the arbitrator in these proceedings, nor to the Court below, this is clearly a question of contract interpretation involving the arbitrator alone.

III

THE FACT THAT A PORTION OF THE ARBITRATOR'S AWARD CONCERNED A PRIOR AND SUPERSEDED COLLECTIVE BARGAINING AGREEMENT PROVIDES NO BASIS IN THE CIRCUMSTANCES OF THIS CASE FOR THE RELIEF SOUGHT BY APPELLANT.

There can be little dispute today that under the applicable law labor arbitration awards may be issued pursuant to and in interpretation of expired collective bargaining agreements. See *United Steelworkers of America v. Enterprise Wheel & Car Corp., supra; Local 7-644, Oil & Chemical Atomic Workers International Union v. Mobil Oil Co., supra; Piano & Musical Instrument Workers Union v. Kimball Co., supra; Zedanok v. Glidden Co.* (CA-2; 1961) 288 F. 2d 99; *Local Lodge No. 595 of District No. 152 v. Howe Sound Co., supra; Monroe Sander Corp. v. Livingston, supra.* The power of arbitrators to issue awards pursuant to expired collective bargaining agreements is derived from the policy of the national labor laws to encourage voluntary settlements and thereby encourage the promotion of peace and stability in the collective bargaining relationship. Ordinary contract law may in some civil cases preclude

arbitration under an expired agreement, but a collective bargaining agreement is not an ordinary contract and not to be interpreted according to ordinary contract law. *General Warehouse & Employees Union, No. 636 v. American Hardware Supply Co.* (CA-3; 1964) 329 F. 2d 789, 793.

Fully aware that the law empowering arbitrators to issue awards applying the terms of expired contracts is beyond question, the Company's entire thrust *since the arbitration award was rendered* has been that the parties never "agreed" to submit any issue to the arbitrator relating to the 1962 collective bargaining agreement. Seeking to buttress this after-the-fact contention the Company quotes from Sections XI-C and XI-D of the contract and from some of the arbitrator's preliminary remarks in the transcript before he was fully apprised of the issues.

The Company significantly omits to point out that subsequent to the arbitrator's opening remarks at the hearing, counsel for the Union and the Company engaged in an extensive dialogue (Arb. Tr. 4-27), wherein the entire question of arbitrability under both the 1962 and the 1965 contracts was *submitted* to the arbitrator for his resolution.

> The Arbitrator: Well, I think I have an understanding now of the issues. In any event *the Company is raising the issue* that the dispute is not arbitrable.
>
> Mr. Clinton: *That is correct.*
>
> The Arbitrator: *So it will be necessary to decide that. And the other two issues will follow if there is an affirmative finding with respect to*

> *issue No. 1* [the question of arbitrability] *as stated in your letter.*
>
> *Is that correct?*
>
> Mr. Clinton: *That is correct.* (Arb. Tr. p. 14, lines 1-9.)
>
> . . .
>
> Mr. Clinton: The contract is clear that the arbitrator has no authority to deal with the events prior to the time of this contract.
>
> Mr. Davis: We don't agree with that.
>
> The Arbitrator: *That is a subsidiary question that will have to be determined in the course of the proceedings or at the conclusion of the proceedings,* because I am sure that Mr. Davis will raise the issue by the offered evidence. (Arb. Tr., p. 14, lines 21-26; p. 15, lines 1-5. Emphasis supplied.)

Thus, it is clear beyond any dispute that the question of arbitrability of the existence of a painter classification under both the 1962 and the 1965 contract was a question submitted to the arbitrator for his determination. The arbitrator's authority to act on the question was derived from the submission of both counsel at the hearing. Since *United Steelworkers v. Warrior & Gulf Navigation Co., supra,* it is clear that all issues submitted to the arbitrator, *including the question of arbitrability,* may be submitted and resolved finally by the arbitrator. See *United Steelworkers v. Warrior & Gulf, supra,* 363 U.S. 583 (footnote 7). See also: *Local 24 (IBEW) v. Bloom Company, supra; A. S. Abell Company v. Baltimore Typographical Union No. 12* (CA-4; 1964) 338 F. 2d 190.

Every issue in the case, including interpretation of the contract in all particulars and arbitrability of the disputes under the 1962 and the 1965 contracts, were thus clearly submitted to the arbitrator without reservation for his determination. The contract language stating that "the decision of the Arbitrator shall be in writing and shall be final and binding upon both parties" (R. Vol. 1, page 12 [c.b.a. 26]; R. Vol. 1, p. 24) precludes subsequent judicial inquiry into arbitrability where the question of arbitrability has been submitted to an arbitrator for his determination. This Court now is without authority to review the arbitrator's determination on all issues submitted, unless the arbitrator's conclusions were demonstrably not based upon his "honest judgment." *Ficek v. So. Pac. Co., supra.*

In view of the submission of all issues to the arbitrator and in view of the flagrant contractual violations on the part of the Company found by the arbitrator, his remedy in awarding Harold Zimmer back pay was entirely justified. It is appropriate to observe parenthetically, that Arbitrator Burns is among the most distinguished and articulate arbitrators in this region, and he was chosen by the parties here to be a member of their arbitration panel by mutual agreement and has regularly served them in that capacity in many other cases. A careful reading of his award discloses that it is in no sense capricious or arbitrary. Rather, the award represents a genuine good faith effort on the part of Arbitrator Burns to resolve a difficult dispute, which the parties had voluntarily consigned to him for a final decision.

CONCLUSION

The right to a final and binding arbitration is a right set forth in the parties' collective bargaining agreement, and the right to a summary confirmation of an arbitration award is a right arising under Section 301 of the Labor-Management Relations Act. For the reasons stated above and supported by the entire record herein, it is respectfully submitted that the United States District Court for the Northern District of California correctly found that the arbitration award herein should be confirmed. The appeal therefrom should be dismissed.

Dated, San Francisco, California,
May 10, 1968.

Respectfully submitted,
CARROLL, DAVIS, BURDICK & MCDONOUGH,
ROLAND C. DAVIS,
ALAN C. DAVIS,
Attorneys for Appellees.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

ROLAND C. DAVIS,
Attorney for Appellees.

NO. 22153
22153-A

United States Court of Appeals

NINTH CIRCUIT

GEORGE ULLMAN & JOE SIMON,
INTERESTED PARTIES,

Appellants,

vs.

KYLE Z. GRAINGER, JR., et al.,

Appellees.

Appeal from the United States District Court for the
Central District of California.

APPELLANTS' OPENING BRIEF

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TOPICAL INDEX

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TABLE OF AUTHORITIES CITED

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NO. 22153
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APPELLANTS' OPENING BRIEF

I
FACTUAL BACKGROUND OF CASE

The Debtor Corporation filed the instant proceedings for the Reorganization of a Corporation and its subsidiaries under Chapter X of the Bankruptcy Act on January 31, 1964. KYLE Z. GRAINGER, JR. is the duly appointed, qualified and acting Reorganization Trustee in the within proceedings, and the law firm of GENDEL, RASKOFF, SHAPIRO and QUITTNER is acting as his attorneys.

There are three consolidated appeals before this Honorable Court. They were consolidated by Stipulation and Court Order thereon (C.T. p. 199-201). All three appeals involve the same real property and the issues relating thereof by the Reorganization Trustee (C.T. p. 200, lines 16-18).

Reference shall be made to the Real Property in this Brief either as "PROPERTY" or by its street address of 929 South Hope Street, rather than by its legal description.

At all times herein mentioned and until April 7, 1967, the legal title to 929 South Hope Street was not and had never been rested in the Reorganization Estate or any of the Debtor Corporations, but was vested in the University of America Foundation, a corporation which is represented by attorney JOHN N. FROLICH (the same attorney who represents the appellants herein). An Order to Show Cause and Restraining Order had previously been filed by the Reorganization Trustee in an attempt to have the subject property declared the property of the Reorganization Estate. The University of America Foundation had been contesting the position of the Reorganization Trustee for a period of approximately two years prior to April 7, 1967. (C.T. p. 57,

line 29 to p 58, line 3) No court hearing was held on the Order to Show Cause However, the University of America Foundation stipulated to an injunction which restrained them from selling the property.

Said Real Property was encumbered by a purchase money First Trust Deed upon which a default was recorded sometime in 1966 A Trustee's (under the Trust Deed) Foreclosure Sale was advertised for January 19, 1967, at 11 a m. by the said Trust Deed Trustee at the request of the beneficiary SCOTTISH RITE CATHEDRAL ASSOCIATION (C T p 53 line 25 to p. 55, line 21 [no p. 54]). The unpaid balance of the First Trust Deed was approximately $125,000 00 on January 19, 1967 (R.T. p. 13C, lines 18 to 23)

The University of America Foundation, through their attorney JOHN N FROLICH, agreed to permit the Reorganization Estate to hold a sale of 929 South Hope Street—the subject Real Property—in the Bankruptcy Court, and agreed, upon confirmation of a sale, to cooperate in delivering title to the Real Property at the time that escrow was to close, so that the Reorganization Estate could benefit by the equity in the property. At that time (after a sale) the University of America Foundation would release any claim on the funds paid to the Reorganization Estate.

The Reorganization Trustee, pursuant to Court Order, advertised a sale of 929 South Hope Street to be held in the courtroom on January 11, 1967. No acceptable offer having been made at that time, the matter of the sale of 929 South Hope Street was continued by the Court to January 19, 1967, at 9:30 a.m., one and one-half hours prior to the Foreclosure Sale on the subject property. It was agreed by all interested parties that the minimum bid which would be acceptable to

the Estate should be $275,000 for a free and clear title to the property. (C.T. p. 51, lines 10 through 26) (R.T. Jan. 19–67 p. 5, lines 24 to 26) Arrangements had been made between JOHN N. FROLICH, counsel for University of America Foundation and MONTA SHIRLEY, attorney for SCOTTISH RITE CATHEDRAL ASSOCIATION, that if the Bankruptcy Court confirmed a sale of the subject real estate before 11 a.m. on January 19, 1967, then the Foreclosure Sale would be continued by the SCOTTISH RITE in order to permit the sale to go through escrow.

At approximately 3:15 p.m. on January 18, 1967, JOHN N. FROLICH was contacted by SIMMONS, the President of University of America Foundation (the appellants herein) and advised that two men had inspected the Property and they were interested in purchasing 929 South Hope Street and desired an appointment. FROLICH contacted ARNOLD QUITTNER (who was out of town) and KYLE Z. GRAINGER, JR., the Reorganization Trustee, who was present during the negotiations which continued until approximately 7:00 p.m. on January 18, 1967, in the office of FROLICH. The appellants were not represented by legal counsel during the negotiations on January 18, 1967, and asked JOHN N. FROLICH to present their offer to the Court at the hearing the next morning. As a result of the discussion in FROLICH's office on January 18, 1967, an unconditional written offer to purchase was entered into between ULLMAN, SIMON AND GRAINGER, the Reorganization Trustee, which was accepted by GRAINGER subject to Court approval (C.T. pp. 66 and 67) and witnessed by JOHN N. FROLICH.

On January 19, 1967, the Court orally approved the offer of ULLMAN AND SIMON, and the Foreclosure Sale of the

Real Property was voluntarily continued by the beneficiary SCOTTISH RITE CATHEDRAL ASSOCIATION in order to permit the Reorganization Trustee to close escrow with the purchasers.

Differences of opinion occurred between the attorney for the Reorganization Trustee and the purchasers as to the meaning of the term "Appurtenances" in connection with the sale. This was resolved at a conference held in the courtroom of the Referee, to the satisfaction of all parties, and a COURT ORDER CONFIRMING AND APPROVING SALE OF REAL PROPERTY (929 South Hope Street) was filed on February 10, 1967, and entered on February 14, 1967. (C.T. p. 51, lines 26 to 32) A copy of said Order may be found in the Clerk's Transcript (C.T. pp. 18 through 22).

The Real Property involved consisted of a two-story building located at 929 South Hope Street and a parking lot area adjacent thereto on the north side of the lot. In all prior discussions among the Referee, the Reorganization Trustee, his attorney, University of America Foundation, and its attorney, all parties were of the opinion that the lease of the parking lot contained a 30-Day Cancellation Clause which could be invoked by a purchaser of the real property upon a valid sale. The lease was entered into by the University of America Foundation (without legal counsel) and at a time after the instant Chapter X proceeding had been filed. CHARLES SIMMONS, II, who executed said lease on behalf of University of America Foundation, notified the Reorganization Trustee and his attorney of the lease. Prior to the execution of this renewed lease, QUITTNER had notified the Lessee that the Reorganization Trustee did not recognize the title of the University of America Foundation and that all

rent payments to University of America Foundation, the alleged Lessor, were made at their peril by the Lessee.

The purchasers ULLMAN AND SIMON were advised of a 30-day cancellation clause in said lease by JOHN N. FROLICH and KYLE Z. GRAINGER, JR. on January 18, 1967. ULLMAN & SIMON are parking lot operators. Although not part of the discussions in open court at the time of oral confirmation of sale on January 19, 1967, nor part of the Court Order of February 10, 1967, confirming the sale, the 30-day cancellation clause was recited in the escrow instructions. (C.T. p. 22, para. 1)

An escrow was opened at the Hollywood National Bank on February 3, 1967, and the escrow instructions were made part of the Court Order of February 10, 1967 (C.T. pp. 21-22). The purhcasers, ULLMAN AND SIMON, were prepared to close escrow within the original 30-day period; however, the Reorganization Trustee, through his attorney, ARNOLD QUITTNER, requested additional time in order to bring on an ORDER TO SHOW CAUSE and APPLICATION FOR POSSESSION OF REAL PROPERTY (the Parking Lot), after he discovered that the Parking Lot Lease had no cancellation clause. The Lessee CHARTER AUTO PARKS answered and objected to the summary jurisdiction of the Bankruptcy Court (C.T. pp. 128-131).

Thereafter, on March 23, 1967, QUITTNER wrote JOHN N. FROLICH a letter advising in part that "under the existing circumstances and in view of the apparent intent of CHARTER AUTO PARKS to litigate the matter, the Trustee now advises you on behalf of the buyers (GEORGE ULLMAN and JOE SIMON) that it appears unlikely that possession of the Parking Lot can be delivered within a

reasonable period of time, and, accordingly, it now appears that the Trustee will be required to refund the deposit of $27,500.00. Please advise me on or before 5:00 p.m., March 30, 1967, whether the buyers will accept the property subject to whatever rights have been created in CHARTER AUTO PARKS or their successors by reason of the lease of January 20, 1966." (C.T. pp. 109-110)

On April 13, 1967, JOHN N. FROLICH replied to said letter and advised QUITTNER that his clients ULLMAN AND SIMON were prepared to close escrow immediately and take title to the property and permit the Trustee to litigate the matter of possession of the Parking Lot in the future. (C.T. pp. 116-117)

On Friday, April 28, 1967, JOHN N. FROLICH received one envelope from ARNOLD QUITTNER containing two original letters and copies of other letters notifying ULLMAN AND SIMON that an Order had been signed by the Court which, in effect, cancelled their sale and put the same real property up for further offers on the coming Monday, May 1, 1967, at 1:30 p.m. (Exhibits C.T. pp. 118-119-120-121-122 and 123) (C.T. pp. 23 and 24—specifically lines 11 through 19).

Appellants ULLMAN AND SIMON and their attorney JOHN N. FROLICH were present in Court at the hearing on May 1, 1967, at 1:30 p.m., and objected strenuously to the jurisdiction of the Court to proceed with the new sale of the same real property. (R.T. p. 8, line 25 to p. 16, line 10, and re ULLMAN p. 21, line 17 to p. 22, line 5)

It is important to note that the Reorganization Trustee and his attorney ARNOLD QUITTNER, on May 1, 1967, were obviously extremely anxious to make a sale to JOE's AUTO PARKS (a co-partnership), even at the expense of their own

integrity and at a financial loss to the Reorganization Estate, and to pay a Finder's Fee when the Estate had no legal right or obligation to do so. The Referee carefully pointed out that a Finder's Fee was requested by the law firm of SULMEYER & KUPETZ, who then proceeded to waive any right to it. (R.T. p. 3, line 25 to p. 7, line 1)

Further, Exhibit "B" attached to the TRUSTEE'S APPLICATION FOR ORDER MODIFYING ORDER CONFIRMING AND APPROVING SALE OF REAL PROPERTY (929 South Hope Street) filed February 10, 1967, and entered February 14, 1967, and for ORDER PRESCRIBING NOTICE OF HEARING TO CONSIDER FURTHER OFFERS FOR THE SALE OF 929 SOUTH HOPE STREET AND AUTHORIZING CONFIRMATION OF SALE, is the escrow instructions entered into between the Reorganization Trustee (without prior or subsequent Order of the Court) and MORRIS M. GREENSTEIN on April 24, 1967, before the Trustee had applied to the Court for any Order Modifying or Cancelling the Sale with ULLMAN AND SIMON and while the escrow with them was still pending at the Hollywood State Bank– and while he still retained their deposit of $27,500.00 cash. Referring to the matter of a Finder's Fee, the alleged sale to said MORRIS M. GREENSTEIN specifically excluded the liability of the Reorganization Estate in the payment of a Finder's Fee or brokerage fee (C.T. p. 39(f)).

At the time of the alleged sale held in Court, the same MORRIS M. GREENSTEIN bid $308,000.00 for the subject real property (R.T. p. 25, line 22) and the alleged successful bidder, JOE's AUTO PARKS, bid $309,000.00–but subject to a 2 and 1/2 per cent Finder's Fee (C.T. p. 44, line 25 through line 26), which would net the Reorganization Estate

only $301,275.00, $6,725.00 less than the bid of GREENSTEIN would net the Estate! Yet it was approved!

Appellants filed their APPLICATION OF GEORGE ULLMAN AND JOE SIMON FOR AN ORDER TO SHOW CAUSE WHY THE ORDER PRESCRIBING NOTICE OF HEARING TO CONSIDER FURTHER OFFERS FOR THE SALE OF 929 SOUTH HOPE STREET AND AUTHORIZING CONFIRMATION OF SAID SALE SHOULD NOT BE VACATED AND THE PREVIOUS ORDER CONFIRMING AND APPROVING SALE OF REAL PROPERTY (929 SOUTH HOPE STREET) FILED FEBRUARY 10, 1967, AND ENTERED FEBRUARY 14, 1967, SHOULD NOT BE REINSTATED AND THE ESCROW THEREUNDER COMPLETED (C.T. pp. 50 through 78) and an Order to Show Cause in re THE APPLICATION OF GEORGE ULLMAN AND JOE SIMON FOR AN ORDER MODIFYING ORDER OF FEBRUARY 10, 1967, DECLARING THE ALLEGED SALE OF MAY 1, 1967, NULL AND VOID, AND DECLARING THAT THE ORIGINAL SALE TO THE APPLICANTS BE COMPLETED FORTHWITH was issued setting a hearing for May 15, 1967, at 2:00 p.m. (C.T. pp. 81-82).

On May 8, 1967, Honorable Henry C. Westover issued an *ex parte* order which vacated the Order Confirming and Approving Sale of Real Property (929 South Hope Street) to JOE's AUTO PARKS.

This Honorable Court's attention is specifically directed to the appellants' Application for an Order to Show Cause filed May 5, 1967 (C.T. pp. 50 through 78), in which the following verified allegations were made:

> "A. Your Applicants, ULLMAN AND SIMON, were always willing to conclude the sale

as ordered by the ORDER CONFIRMING AND APPROVING SALE OF REAL PROPERTY (929 South Hope Street) FILED FEB. 10, 1967, AND ENTERED FEB. 14, 1967.

"B. Your Applicants were in any event entitled to receive notice of said Application since they already had equitable interest in the subject property under the law of the State of California and were being deprived of property without due process of law.

"C. Your Applicants are interested parties.

"D. There was no restraining order or injunction in effect restraining the foreclosure of the subject property by the Scottish Rite Cathedral Association (the holder of the first trust deed) since 1966.

"E. Prospective purchasers known to the Trustee and his attorney were never notified of the proposed sale to be held on May 1, 1967, in the courtroom of Referee Moriarty.

"F. Trustee never did cancel the sale with Applicants before they applied to the Court on April 25, 1967, for the Ex-Parte Order.

"G. Trustee never attempted to return the deposit of Applicants until after confirmation of sale on May 1, 1967.

"H. Trustee through his attorney defrauded Morris M. Greenstein into purchasing the subject property.

"I. Trustee through his attorney obtained a deed to the subject property by fraud and

misrepresentation. Said deed was obtained from University of America Foundation, the record title holder without any consideration.

"J. Your Applicants have obtained financing for their purchase of the subject property.

"K. Your Applicants have paid out and are obliged to pay out a sum in excess of $6,000.00, all in reliance on their confirmed sale."

The appellants never had the opportunity to present any evidence on said application. On the return date of the Order to Show Cause on May 15, 1967, although the following persons had been subpoenaed and were present in the courtroom and were prepared to testify, the Court indicated it would be a waste of time to hear the matter (R.T. May 15, 1967):

a) Milton Handman (allegations in C.T. p. 57, lines 2-16);

b) Nat Steckler (allegations in C.T. p. 57, lines 18-27);

c) Charles Simmons (allegations in C.T. p. 57, line 29 to p. 60, line 14);

d) Phyllis Jacob (allegations in C.T. p. 58, lines 4-26);

e) Morris M. Greenstein (allegations in C.T. p. 60, line 16 to p. 61, line 31); and

f) Applicants GEORGE ULLMAN and JOE SIMON (allegations in C.T. p. 62, lines 2-22).

The Court denied the application of the appellants and dismissed their Order to Show Cause on May 22, 1967. The appellants filed objections to the Order and moved the Court to rehear the Order, which was denied.

It appears rather odd that on June 5, 1967, JOE's AUTO PARKS filed a NOTICE OF MOTION AND MOTION FOR ORDER CONFIRMING SALE and gave no notice to the

appellants or to the University of America Foundation after they had discovered on May 15, 1967, that both parties alleged interest in the real property. But odder yet are the POINTS AND AUTHORITIES (C.T. pp. 153-157) which, in legal effect, support the position of appellants ULLMAN and SIMON, both then and on this appeal.

Appellants filed their first appeal from the ORDER MODIFYING ORDER OF FEBRUARY 10, 1967, PRESCRIBING NOTICE OF HEARING TO CONSIDER FURTHER OFFERS FOR SALE OF REAL PROPERTY AND DIRECTING SPECIAL MASTER TO HOLD HEARING filed on April 26, 1967 (C.T. pp. 23-25), which purported to terminate the pending sale escrow with ULLMAN and SIMON (C.T. p. 23, lines 23 to 25) without notice (C.T. p. 23, line 20).

The second appeal was filed by appellants from the ORDER DENYING APPLICATION OF GEORGE ULLMAN AND JOE SIMON, filed May 5, 1967, DISMISSING ORDER TO SHOW CAUSE IN RE APPLICATION OF GEORGE ULLMAN AND JOE SIMON issued May 5, 1967, and ENJOINING AND RESTRAINING PARTIES (C.T. pp. 146-149) filed May 22, 1967 (C.T. pp. 180-181).

The third appeal was filed by appellants from the ORDER OF AUGUST 3, 1967, which REINSTATED AND CONFIRMED SALE OF CERTAIN REAL PROPERTY OF MAY 1, 1967, AND VACATING THAT PORTION OF THE ORDER OF THIS COURT OF MAY 22, 1967, to wit, that the TRUSTEE FILE AN APPLICATION WITH THE REORGANIZATION COURT FOR AN ORDER PRESCRIBING NOTICE AND DATE OF HEARING THEREWITH (C.T. pp. 190-194) and (C.T. pp. 195-196).

II

A
CONSTITUTIONAL QUESTIONS INVOLVED

Failure To Give Notice To Appellants Of The Trustee's Application of April 25, 1967, And Order Thereon, Whereby The Sale Of The Property In Question To Appellants Was Vacated, Constitutes A Violation Of Due Process As Provided By The Fifth Amendment To The Constitution Of The United States.

Local Bankruptcy Rule 222 is as follows:

> "The rules of civil procedure for the United States District Courts insofar as they are not inconsistent with the Bankruptcy Act or the General Orders shall apply to and regulate proceedings before the Referees."

11 U.S.C.A. 67 (A-1) relating to the duties of Referees is as follows:

> "Referees shall give notice to creditors and other parties in interest, as provided in this Title . . ."

In the case of *England v. Doyle,* a Ninth Circuit case, 281 Fed.2d 304, the Court, in referring to notice of a hearing, ruled as follows:

> "When the granting of the relief sought by a litigant would operate to terminate, impair or modify a substantial right or claim of another, then due notice of the proceeding must be given the person so affected in order to meet the requirements of due process . . ."

It is clear, therefore, that since your appellants had a substantial right or claim to the real property in question, the failure to give them notice of the application and the opportunity for a hearing thereon before an order was issued constituted a violation of due process as provided for by the Fifth Amendment to the Constitution of the United States.

B

OTHER LEGAL QUESTIONS INVOLVED

1. A Sale By A Bankruptcy Court Is A Judicial Sale.

> "A sale through proceedings in bankruptcy is a judicial sale, subject to the same rules as an auction."
>
> *In re Glas-Shipt Dairy Co.*, 239 Fed. 122, 124 (7 Cir. 1917).
>
> "A sale of assets of a bankrupt's estate, under an order of the Bankruptcy Court directing such sale, is a judicial sale as distinguished from an execution sale. *In re Haywood Wagon Co.* (2 Cir.) 219 Fed. 655, cert. denied 238 U.S. 625, 35 S.Ct. 663, 59 L.Ed. 1495."
>
> *In re Winthrop Mills,* 109 Fed.Supp. 323, 325 (Me. 1952).

2. Public Policy Requires That Judicial Sales Be Final.

An impossible situation would exist if there were no point in time at which all parties could be certain that a sale of assets in bankruptcy was final. A bidder could never be

certain of his rights with respect to property he believed he had purchased at a judicial sale, and therefore no one would bother to bid.

In addition to the above evil, persons who believe themselves to have been purchasers at judicial sales who are required to put up sizable deposits in order to confirm their bid could be seriously damaged. Such is the case in the present situation. In addition to the loss of the use of $27,500.00 (the deposit) for the period from January 19, 1967 to date, petitioners have also been damaged in that they obtained financing commitments at a cost of approximately $10,000.00 to date with respect to the purchase of this property.

For the many above reasons, and for more which can be easily conceived, it is quite obvious that public policy demands that judicial sales, such as the one which is involved in this case, must be final. In addition to the above stated reasons, there are numerous cases which hold that judicial sales must be final.

In the case referred to above, *In re Winthrop Mills, supra,* petitioner contended that the price which had been bid was inadequate and that the sale had not been adequately publicized. He filed a petition in order to overturn the confirmation of the sale to the highest and best bidder. The highest and best bidder had bid approximately 96% of the appraised value of the property. The Court, on review, adopted the opinion of the Referee, upholding the sale. This opinion found that the sale had been well advertised and that the price was adequate. In commenting upon judicial sales, the opinion stated:

> "Judicial sales are an indispensable part of the machinery employed in the administering of

> bankrupt estates. Public policy requires stability in such sales. *In re Burr Mfg. & Surety Co.* (2 Cir.) 217 Fed. 16. To induce bidding at such sales and reliance upon them 'the purpose of the law is that the sale shall be final,' *Rewabic Mining Co. v. Mason,* 145 U.S. 349, 12 S.Ct. 887, 888, 36 L.Ed. 732. Except in extraordinary circumstances the integrity of judicial sales can best be preserved by confirming the highest bids in any case where it appears the auction was fairly conducted, properly attended, and well advertised. There seems to be no cogent reason why these considerations of policy should not govern in the instant case and the petition for confirmation offered by the trustee approved."
>
> (109 Fed.Supp. at 325)

Another case in which similar language appears, although the result differed because of dissimilar facts, is *J. J. Sugarman Co. v. Davis,* 203 Fed 2d 931 (10 Cir. 1953). The following pertinent language appears in that case, starting at page 932:

> "It is well established by an unanimous line of decisions that the integrity of judicial sales must be protected. *It has been said time without number that refusing to confirm a sale to a high bidder merely because an intervening higher bid has been received is the surest way to destroy confidence in judicial sales and defeat the purpose sought to be accomplished thereby,* to realize the greatest amount from such sales to those entitled to receive the proceeds thereof. This principle was announced in the early case of *Jacobson v. Larkey* (3 Cir.) 245 Fed. 538, 541, L.R.A. 1918C, 1176, where the court said, 'The rule

is that mere inadequacy of price is not a sufficient ground for setting aside a judicial sale; but when the inadequacy is so great as in itself to raise a presumption of fraud or to shock the conscience of the Court, it becomes gross inadequacy, and is sufficient ground.' And in *Smith v. Save-Rite Drug Stores* (10 Cir.) 178 F.2d 507, 510, we said that 'A practice of permitting an unsuccessful bidder at a public auction, through sealed bids, after the amount of the highest and best bid at the auction has been disclosed, to submit a second bid when the matter comes on for confirmation of the sale,' would tend to destroy the efficacy of auctions through sealed bids.

" . . .

"*Where one's bid has been accepted, he has a vested interest which under the decisions may be destroyed only for the most cogent of reasons,* such as fraud, or conduct which in effect amounts to fraud. But as has been said many times, the mere fact that someone comes forward and offers to bid more will not be tolerated because it is an invasion of a right acquired by the successful bidder at a free and open sale and for the further and even more weighty reason that permitting this to be done would undermine confidence in judicial sales and thus defeat the end sought to be obtained, the protection of estates being thus liquidated." (Emphasis added.)

(203 Fed. 2d at 932, 933)

3. The Federal Courts Are Required To Follow State Decisions On Matters Of General Law.

It is well established that the Federal Courts are required to follow the statutes or case law of the State, where the cause of action arose with reference to the substantive law to be applied, as long as it does not conflict with the federal law.

Erie Railroad Company v. Harry J. Tompkins, 304 U.S. 64, 82 L.Ed. 1188.

4. Appellants Were The Equitable Owners Of The Real Property Under California Law.

In California, the doctrine of equitable conversion is the general law, and under that doctrine, appellants were the equitable owners of the real property in question.

In *Vigli v. Davis,* 79 Cal.App.2d 237, 254, the Court held as follows:

> "Undoubtedly the true rule of equitable estoppel is, as set forth in *Estate of Dwyer,* 159 Cal. 664, as cited by defendants, to the effect that when a binding agreement of sale is entered into by the parties, then equitable conversion has worked; the purchaser becomes the equitable owner of the land and the seller the owner of the purchase price."

In the *Estate of Dwyer,* 159 Cal. 664, on page 675, the Court held:

> "When a contract for sale of real property binding on the parties is executed, an equitable conversion is worked; the purchaser of the land is deemed the equitable owner thereof, and the seller is considered

> the owner of the purchase price. The equitable conversion is thus deemed to exist from the time the valid contract of sale is entered into and may or may not be absolute. Whether it is, or not, will depend upon whether the terms of the contract of sale are subsequently complied with. If there is no default in that respect, but, on the contrary, the purchaser performed all of the conditions precedent which under the contract entitled him to a conveyance on a given date, he will be deemed on that day to be the owner of the land and the sellers to be the owners of purchase money. The fact that the contracting owner of the land refuses to perform his part of the agreement and make the conveyance to which the purchaser is entitled in compliance with the contract, cannot affect the status or right of the parties as to the property. The purchaser having performed or offered to perform his covenant at the date when the contract called for a conveyance to him, equity considers the property as belonging to him as of that date, and the owner as simply holding a legal title in trust for him. . . ."

It is clear, therefore, that your appellants had a substantial right and claim to the property in question and that the action of the Trustee in vacating the Order of Sale of February 10, 1967, to your appellants, terminated, impaired, and modified said right. The law of California is clear insofar as the interest of your appellants in the real property is concerned, and it is clear that a mere contract right, even in the absence of the doctrine of equitable conversion, should be afforded the same protection of due process , as the case herein where, in

fact, the doctrine of equitable conversion conveyed title to the real property to your appellants. Keeping in mind the landmark decision of *Erie v. Tompkins, supra,* this Honorable Court is required to follow the general laws of the State of California which provide for the doctrine of equitable conversion. In legal effect, by said doctrine, the equitable title was conveyed to appellants from the date the contract was entered into and confirmed by a court of competent jurisdiction.

5. **The Order Of The United States District Court (of February 10, 1967) Confirming Sale Of The Real Property To ULLMAN And SIMON Was Final When The Court Attempted To Set It Aside, And The Order Of The Court Purportedly Setting It Aside Was In Excess Of Its Jurisdiction.**

On the 10th day of February, 1967, an order confirming sale of the subject property was filed, and on the 14th day of February, 1967, it was entered. The United States District Court confirmed the sale of the real property in question, by its Order of that date, to ULLMAN and SIMON. No motion for rehearing nor appeal from that order has ever been taken.

> "A person aggrieved by an order of a referee may, within ten days after the entry thereof, or within such extended time as the Court may for cause so allow, file with the referee a petition of review. . . ."
>
> 11 U.S.C.A. Section 67.
>
> "Appeals under this Title to the United States courts of appeals shall be taken within thirty days

after written notice to the aggrieved party of the entry of the judgment, order or decree. . . . "

11 U.S.C.A. Section 48-A.

Where the time for appealing from an order of the bankruptcy court has expired, the order becomes a final order and is no longer the subject of review. See

Jelks v. Aetna Life Insurance Co.,
134 Fed.2d 870.

Failure to prosecute an appeal in thirty days is fatal to the appeal. See

Clements v. Conyers, 31 Fed.2d 563.

It is clear, therefore, that the order confirming sale of the real property in question to the appellants is a final order, no appeal having been taken within the statutory period. That being the case, said order could not be disturbed as a matter of law, either on April 26, 1967, or at this time, with or without prior notice to appellants.

6. The Trustee In Bankruptcy Had Waived Any Possible Right To Cancel The Escrow With ULLMAN And SIMON And Was Estopped From Taking Any Affirmative Action To Cancel Either The Sale To Appellants Or Said Escrow.

> "A waiver is the intentional relinquishment of a known right with knowledge of the facts. It is a voluntary act and implies an abandonment of a right which can be enforced or a privilege which can be exercised."

Strauss v. Owens, 148 Cal.App.2d 570, 574.

On March 23, 1967, the attorney for the Trustee wrote a

letter to JOHN N. FROLICH setting forth a deadline of March 30, 1967, in which appellants herein could accept the property in question with the existing encumbrances. On April 13, 1967, JOHN N. FROLICH wrote the attorney for the Trustee agreeing to take the property under the existing contingencies and to close the escrow immediately.

If the Trustee had any rights whatsoever to cancel the sale to your appellants on March 30, 1967, then those rights were waived by his inactivity to the 13th day of April, 1967. In fact, he did not take any action until the 25th day of April, 1967, when he entered into a contract for the sale of the property in question with MORRIS M. GREENSTEIN without any authority from the Court.

> "Waiver may be shown by conduct, and it may be the result of an act which, according to its natural import, is so inconsistent with the intent to enforce the right in question as to induce a reasonable belief that such right has been relinquished."
>
> *Howard J. White, Inc. v. Varian Associates,* 178 Cal.App.2d 348, 355.

The conduct of the attorney for the Trustee clearly precludes his asserting any reason whatsoever for not conveying title as it stood at that time, to your appellants herein.

> "One who agrees to waive or forego a right is precluded from afterwards asserting the right waived." See
>
> *Faye v. Feldman,* 128 Cal.App.2d 319, 328.

In *People v. Ventura Refining Co.,* 204 Cal. 286, 295, the Court held as follows:

> "Anyone may waive the advantage of a law intended

> solely for his benefit. It has been held many times in this state and the rule is universal that a party may waive the benefits specially conferred upon him by statute and constitution. When this waiver is made, estoppel to rely on the exemption will arise in any case where it is inequitable or unjust to permit it."

In the present case, the Trustee requested that appellants, by a given date, accept or reject a proposal for changed terms for the purchase of the real property in question. Although the appellants did not respond by the date in question, the Trustee took no action whatsoever. On April 13, 1967, the Trustee was notified that appellants would accept the property with the title as it then stood. Thirteen days thereafter, without any notice whatsoever, the attorney for the Trustee presented an *ex parte* application to the Court for an order which had the effect of terminating the sale to appellants and allowing bidding to be commenced again. Appellants had equitable title to the property under California law, *supra*. Assuming without admitting that the Trustee may have had the right to terminate the escrow, it was waived by his inactivity and his failure to take any steps whatsoever. The Trustee was therefore estopped to assert any action whatsoever, especially after the letter of JOHN N. FROLICH, as aforementioned, dated April 13, 1967.

7. Damages Do Not Constitute An Adequate Remedy At Law For The Breach Of Contract To Convey Real Property.

While the contract of sale and the escrow instructions between the Trustee and appellants for the purchase and sale

of the real property contained a no-damage provision, this was for the protection of the Estate in the event of impossibility of performance on the part of the Trustee and not for a deliberate, wilful breach of the contract.

Under the doctrine of *Erie v. Tompkins, supra,* this Honorable Court is required to follow the general laws of the State of California where they do not conflict with Federal authority.

> "It is to be presumed that the breach of an agreement to transfer real property cannot be adequately relieved by pecuniary compensation."
>
> California Code of Civil Procedure,
>
> Sec. 33e 87.
>
> "Ordinarily, if the remedy at law is not adequate, specific performance of any obligation may be compelled if the circumstances are such to authorize relief of that nature and if personal services are not involved. A contract for the sale of real property is perhaps the most common situation where specific performance is granted if the contract fulfills requirements . . . It is presumed that the breach of an agreement to transfer real property cannot be adequately relieved by pecuniary compensation. Even a stipulation of the amount of damages in a particular case will not prevent specific performance. Such a stipulation merely gives a party a right to be satisfied with damages, but, waiving them, he may resort to equity for specific performance. Specific performance of land contract may be enforced by either the purchaser or the vendor." See:

45 Cal. Jur. 2d page 321, Section 45,
and authorities cited therein.

8. The Contract For The Purchase Of Real Property Between Appellants And The Trustee Was Never Cancelled, Terminated, Or Rescinded When The Court Arbitrarily Cancelled It, Ex Parte And Without Notice, On April 26, 1967.

The Escrow Instructions, page 2, Item No. 3, the last sentence thereof, recite the following:

> "Seller shall have the right to abandon this escrow if he determines that he cannot deliver possession of the parking lot within a reasonable period of time to buyer."

On March 23, 1967, the attorney for the Trustee wrote to JOHN N. FROLICH. Said letter seems to form the basis for the action of the Trustee in seeking his *ex parte* order on April 25, 1967. Careful scrutiny of the letter dated March 23, 1967 will show that the attorney for the Trustee did not, at that time, seek to cancel the contract. Said letter recites:

> "That it appears unlikely the possession of the parking lot can be delivered within a reasonable period of time . . ."

The letter then goes on to inquire as to whether or not the purchasers would accept the property subject to whatever rights have been created in the third party. Certainly the letter as heretofore described does not cancel in any way the contract of sale between ULLMAN and SIMON and the Trustee.

In the case of *Busch v. Globe Industries* (1962) 200

Cal.App.2d 315, 320, the Court held as follows:

> "A contract remains in force until it has been terminated either according to its terms or through the acts of the parties evidencing an abandonment [citations omitted]. Abandonment of a contract is a matter of intent and is to be ascertained from the facts and circumstances surrounding the transactions out of which the abandonment was claimed to have resulted. It may be implied from the acts of the party [citations omitted]."

In *Kane v. Sklar* (1954) 122 Cal.App.2d 480, 482, the Court held as follows:

> "The question whether there was an intent to abandon a contract is one of fact to be ascertained from all the facts and circumstances surrounding the transaction [citations omitted]."

On April 13, 1967, JOHN N. FROLICH wrote ARNOLD QUITTNER, attorney for the Trustee. Clearly the seller of the real property in question never intended to terminate the contract as of the date of MR. FROLICH's letter, in that he had not tendered return of the monies deposited with the Trustee and into escrow. Furthermore, the conduct of the parties clearly illustrated that the contract was still in force.

When a valid consideration exists for the contract in question–and the law presumes that the consideration was real and adquate, the seller is not allowed to capriciously terminate the contract. There would have to be cause for the termination. The purchasers of the real property, therefore, would be entitled to a hearing to determine whether or not the seller was attempting to terminate the contract without any

cause whatsoever, especially in view of the fact that the contract had not been terminated prior to the letter of April 13, 1967.

9. Once A Sale Has Been Confirmed By The Court Nothing Is Sufficient To Avoid It Which Would Not Set Aside A Sale Of Like Character Between Private Parties.

In the case of *In re Marathon Foundry & Machine Co.*, 239 Fed.2d 122, the Court stated, at page 126:

> "The *Burr* case, however, is of no benefit to petitioner. There, the District Court confirmed a judicial sale, set it aside and ordered the property resold to a substantially higher bidder. The Court of Appeals reversed, holding that it was error to set aside the order of confirmation. The court stated, at page 21: 'Before confirmation, if the inadequacy of the price be great, slight circumstances of unfairness on the part of the party benefited will be sufficient to prevent confirmation, and will justify the opening of the sale for further bids. * * * But the case is different after the sale has been confirmed, and the court below seems to have lost sight of this distinction. After a sale has been confirmed, the court and the successful bidder are regarded as occupying the relation of vendor and purchaser in an executed sale, and nothing is sufficient to avoid it which would not set aside a sale of like character between private parties."

And at page 127:

> "The master, and apparently the District Court, in addition to our previous opinion 228 F.2d 594, relied upon *J. J. Sugarman Co. v. Davis.,* 10 Cir., 203 F.2d 931, and *In re Stanley Engineering Corp.,* 3 Cir., 164 F.2d 316. The *Sugarman* case, as here, involved a proceeding for reorganization under Chapter X. A sale to the highest bidder was approved both by the District Court and on review. In so doing the Court of Appeals made the following pertinent observation, 203 F.2d at page 933: 'Where one's bid has been accepted, he has a vested interest which under the decisions may be destroyed only for the most cogent of reasons, such as fraud, or conduct which in effect amounts to fraud. But as has been said many times, the mere fact that someone comes forward and offers to bid more will not be tolerated because it is an invasion of a right acquired by the successful bidder at a free and open sale and for the further and even more weighty reason that permitting this to be done would undermine confidence in judicial sales and thus defeat the end sought to be obtained, the protection of estates being thus liquidated.' "

And further the Court stated:

> "It appears to be conceded on all sides that adequacy of price must be determined as of the time of sale. It has been so held. *Morrison v. Burnette,* 8 Cir., 154 F. 617, 625. See also our previous opinion in this matter, 228 F.2d at page 598."

III

SUMMATION

In view of the fact that your appellants were entitled to notice and a hearing prior to the issuance of the Order of April 26, 1967, as a matter of due process under the Fifth Amendment to the Constitution of the United States, it follows that any action taken pursuant to said Order is void and in excess of the Court's jurisdiction. Certainly the sale of May 1, 1967, is nothing more than an extension of the Order of April 26, 1967, and, but for said Order, would not have taken place.

It must also be pointed out that the alleged sale took place prior to May 26, the time that the Order of April 26, 1967, would be final. As previously noted, your appellants, as real parties in interest, had a right to appeal from said Order, and they did.

The sale of May 1, 1967, was invalid under California law by virtue of the doctrine of equitable estoppel, *supra,* wherein your appellants are the equitable owners of the property in question.

It follows, therefore, that the Order of April 26, 1967, being invalid,and the sale of May 1, 1967, being invalid, the original Order of Sale to your appellants has never been cancelled. Your appellants are ready, willing and able to perform any necessary acts required of them to gain legal title to the property.

The time has passed whereby objections may be asserted against the Order of Sale confirmed to appellants on February 10, 1967. As to them, the sale is final and they wish to

consummate it. The Trustee had clearly waived any rights he may have had, if in fact he had any rights at all, and is estopped to countermand the sale to your appellants at this time, especially in view of the detriment suffered by your appellants, as set forth herein.

Finally, as a matter of simple logic, the estate had nothing to sell on May 1, 1967, the real property in question belonging to your appellants. If the Supreme Court of the United States is correct in its definition of due process, then the concept of basic fairness and an orderly society demands that this Honorable Court compel the Court, the Trustee of the Estate, and the Trustee's attorney, to finalize the sale to your appellants.

Respectfully submitted,

JOHN N. FROLICH

Attorney for Appellants
George Ullman and Joe Simon

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United State Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

John N. Frolich, Esq.

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss
County of Los Angeles)

I, the undersigned, say. I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Los Angeles, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 215 West Fifth Street, Los Angeles, California 90013, that on February 25th 1968, I served the within APPELLANTS' OPENING BRIEF (22153, 22153-A) on the following named parties by depositing a copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Los Angeles, California, addressed to said parties at the addresses as follows:

Gendel, Raskoff, Shapiro & Quittner
6380 Wilshire Boulevard
Los Angeles, California

Goldman & Goldman
408 South Spring Street
Los Angeles, California 90013

I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 25th 1968, at Los Angeles, California.

D.A. Standefer

Subscribed and sworn to before me
this day of February, 1968.

Notary Public in and for the
State of California.

DEAN-STANDEFER COMPANY, 215 W. 5th, L.A. 90013

ADDENDUM TO APPELLANTS' OPENING BRIEF

In re: Ullman & Simon vs. Grainger, et al.
No. 22153 – 22153–A
United States Court of Appeals For the Ninth Circuit

It is respectfully requested that this document be attached to and made a part of the Appellants' Opening Brief filed and served in the above matter.

Service hereof conforms with that specified in the Proof of Service annexed to Appellants' Opening Brief.

TOPICAL INDEX HEREOF:

TABLE OF AUTHORITIES CITED

Cases

TABLE OF AUTHORITIES CITED

Cases (cont'd)

Statute

NO. 22153
22153–A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GEORGE ULLMAN & JOE SIMON,
INTERESTED PARTIES,

Appellants,

vs.

KYLE Z. GRAINGER, JR., et al.,

Appellees.

Appeal from the United States District Court for the Central District of California

ADDENDUM TO APPELLANTS' OPENING BRIEF

II

B

OTHER LEGAL QUESTIONS INVOLVED

10. **The Three Orders Appealed From Are Void For Failure To Comply With Section 206 and Section 208 Chapter X Of The Bankruptcy Act.**

Section 206 of Chapter X of the Bankruptcy Act reads as follows:

> "The Debtor, the indenture trustees, and any creditor or stockholder of the debtor shall have the right to be heard on all matters arising in a proceeding under this chapter. . . ."

In decisions applying Section 206 of the Bankruptcy Act, the courts have held that The Debtor, the indenture trustees, and any creditor or stockholder of the debtor shall have the absolute right to be heard on all matters arising in a proceeding under this chapter. Creditors, stockholders and indenture trustees are fully vested with the right to be heard on all matters, with the right to appeal, and with the right to receive notice.

In re The Philadelphia and Reading Coal and Iron Co. (DC Pa. 1939) CCH Dec. Chptr. 51,743.

In re Flour Mills of America, Inc. (DC Mo. 1939) 27 F.Supp. 559, 41 Am. B.R. (N.S.) 59, CCH Dec. Chptr. 51,816.

In re 8309 Talbot Place Corp. (DC NY 1939) 27 F.Supp. 40, 40 Am. B.R. (N.S. 257).

A district court properly denied the motion of a committee of common stockholders to intervene in a reorganization proceeding under Chapter X, but properly designated the committee as a party to receive notice of all matters arising in the proceeding and gave them the right to participate therein as provided by statute.

Dana v. Securities and Exchange Commission, (CCA-2) 125 F.2d 542, 47 Am. B.R. (N.S.) 739, CCH Dec. Chapter 53,598.

An order of a bankruptcy court appointing successor trustees to a common law trust, involved in involuntary bankruptcy proceedings, to fill positions vacated by death and resignation, was reversed on appeal for failure to give notice to beneficiaries of the trust and accord to them the right to be heard.

> *In re National Realty Trust, Sullivan v. Mosser* (CCA-7 1948) 167 F.2d 440, CCH Dec. Chapter 56,050.

It is an idle formality to require a creditor who failed to appear on the first hearing of creditors, but who must be given notice of the second hearing, to wait until the plan of reorganization comes up for confirmation in order to raise any objections which are apparent on the face of the plan; all creditors have an absolute right to be heard on all matters and it is desirable that they should be heard as soon as convenient.

> *Dudley v. Mealey* (CCA-2 1945) 147 F.2d 268, CCH Dec. Chaptr. 55,096, cert. den. (1945) 325 U.S. 873, 65 S.Ct. 1415.

Section 208 of Chapter X of the Bankruptcy Act reads as follows:

> "The Securities and Exchange Commission shall, if requested by the judge, and may, upon its own motion if approved by the judge, file notice of its appearance in a proceeding under this chapter. *Upon the filing of such a notice, the Commission shall be deemed to be a party in interest, with the right to be heard on all matters arising in such proceedings,* and shall be deemed to have intervened in respect of all matters in such proceeding with the same force and effect as if a petition for that purpose had been allowed by the judge; but the

Commission may not appeal or file any petition for appeal in any such proceeding." (Emphasis added.)

Section 265a of Chapter X of the Bankruptcy Act reads as follows:

> "In addition to the notices elsewhere expressly provided, the Securities and Exchange Commission shall be given notice of all other steps taken in connection with a proceeding under this chapter. Any notice which this chapter requires to be given to the Securities and Exchange Commission shall be deemed to have been sufficiently given if it is given by registered first-class mail, postage prepaid, addressed to the Securities and Exchange Commission at Washington, District of Columbia, or at such other place as the Securities and Exchange Commission shall designate by written notice filed in the proceeding and served upon the parties thereto. . . . "

(A) As to the (FIRST) APPEAL FROM THE ORDER filed April 26, 1967. *This Order states "no notice being required . . . "* (C.T. p. 23, line 20)

(B) As to the (SECOND) APPEAL FROM THE ORDER filed May 22, 1967, *there is no recital of notice to creditors or the Securities and Exchange Commission of the hearing of May 15, 1967, which is the basis of the Order.* (C.T. pp. 146 through 149)

(C) As to the (THIRD) APPEAL FILED FROM THE ORDER filed August 3, 1967, *no notice of the hearing to creditors or the Securities and Exchange Commission was given of the hearing on June 26, 1967, which is the basis of the Order.* (C.T. p. 190, line 19 to p. 191, line 13)

It should be noted that, in any event, if the First Order

(April 26, 1967) was a valid one, then ULLMAN and SIMON were creditors of the estate in the amount of $27,500.00–the amount of their cash deposit, which the Trustee retained and was holding when said Order was signed by the Court– and they were entitled to notice.

The Securities and Exchange Commission was requested to and did file a Notice of Appearance in the instant proceeding and never received notice of any of the three Orders set forth above, before they were signed by the Court.

Respectfully submitted,

JOHN N. FROLICH, ESQ.

Attorney for Appellants

STATE OF CALIFORNIA }
COUNTY OF LOS ANGELES } SS.

JOHN N. FROLICH, being first duly sworn deposes and says:

That he is the attorney-of-record for the Appellants' ULLMAN AND SIMON in this appeal.

That when he gave the rought draft of the Appellants' Opening Brief to the printer Dean Standefer Company, he inadvertantly omitted several pages.

Your Affiant did not notice the ommission until Monday, February 26, 1968, when he received a copy of the Appellants' Opening Brief from the printer.

Your Affiant respectfully requests that the attached pages be considered as part of the Appellants' Opening Brief.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 26, ~~1968~~.

JOHN N. FROLICH

SWORN TO BEFORE ME
THIS 26th DAY OF FEBRUARY,
1968.

NOTARY PUBLIC

My Commission Expires ______________.

My ... expires September 3, 1970

NO. 22153
22153-A

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GEORGE ULLMAN & JOE SIMON,
INTERESTED PARTIES,

Appellants,

vs.

KYLE Z. GRAINGER, JR., et al.,

Appellees.

BRIEF OF APPELLEE, KYLE Z. GRAINGER, JR., REORGANIZATION TRUSTEE

Appeal from the United States District Court

for the Central District of California

ARNOLD M. QUITTNER
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Attorneys for Appellee, Kyle Z. Grainger, Jr.

NO. 22153
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Los Angeles, California 90048

Attorneys for Appellee, Kyle Z. Grainger, Jr.

SUBJECT INDEX

LIST OF AUTHORITIES CITED

Cases

Statutes

Miscellaneous

I

STATEMENT OF JURISDICTION

Inasmuch as no jurisdictional statement was made by Appellants as required by Rule 18 of this Court, the following is a brief statement of the pleadings and facts disclosing jurisdiction.

The proceedings herein were commenced by the filing of a voluntary petition for reorganization under the provisions of Chapter X of the Bankruptcy Act (U.S C Title 11, Chapter 10, §§501-676) on January 31, 1964 by the Debtor Corporations, Human Relations Research Foundation, a Washington corporation, and its subsidiaries, Educational Corporation of America, a California corporation, Universal Mortgage Corporation, a California corporation, Trans-America Property Corporation, an Oregon corporation, and La Pine Acres, Inc., an Oregon corporation. On the same date, an Order was entered appointing Kyle Z. Grainger, Jr., the Reorganization Trustee, and an Order of Reference was made to the Referee in Bankruptcy and Special Master.

Jurisdiction of the District Court is based upon the provisions of Bankruptcy Act §111 (11 U S C §511) which provides that the Court in which a Petition is filed shall have exclusive jurisdiction of the debtor and its property, wherever located. The instant proceeding concerns Orders effecting a sale of the property of the debtor. Jurisdiction of the Court of Appeals is based upon Bankruptcy Act §121 (11 U.S.C.

§521) which provides that jurisdiction of the Appellate Courts in Chapter X matters shall be the same as in a bankruptcy proceeding.

Bankruptcy Act §24 (11 U.S.C. §47) provides for appellate jurisdiction in the United States Court of Appeals in proceedings in bankruptcy and in controversies arising in proceedings in bankruptcy. The Orders under appeal herein all arise in proceedings in bankruptcy within the meaning of Bankruptcy Act §24 and, accordingly, jurisdiction was properly vested in the United States District Court and appellate jurisdiction is vested in this Court of Appeals.

II

STATEMENT OF THE CASE

The sole legal issue involved in this appeal is whether or not the District Court abused its discretion in authorizing the Reorganization Trustee to terminate an earlier sale for failure of an express condition and in authorizing a subsequent sale for a substantially better price and free of burdensome conditions. Although the legal issue is a simple one, it has arisen out of a voluminous exchange of documents and pleadings, as is evident from the size of the Clerk's transcript of record on appeal, but this introductory statement is restricted to the events immediately pertinent to the issues on appeal.

By way of a partial compromise of fraudulent conveyance actions filed by the Reorganization Trustee against the University of America Foundation and two principals of the Debtor Corporations (Charles Simmons and Charles Simmons II), the University of America Foundation quitclaimed the property at 929 South Hope Street to the Reorganization Trustee In accordance with an Order entered by the Reorganization Court on December 22, 1966, the Trustee offered the real property for sale in the Courtroom of the Special Master and Referee in Bankruptcy on January 11, 1967. Notice to creditors, to the debtors and to John N. Frolich, in his capacity as attorney for Charles Simmons, Charles Simmons II, and the University of America Foundation, was given in accordance with the

Court's Order of December 22, 1966. No acceptable offer was made for the property at the hearing on January 11, 1967 and, accordingly, the Court continued the matter to January 19, 1967 to hear further offers. Inasmuch as the property was subject to encumbrances and tax liens of approximately $255,000, the Reorganization Trustee fixed $275,000 as the minimum price he would recommend to the Court. At the hearing of January 19, 1967, the Appellants made an offer of $275,000 for the real property and certain personal property. An Order approving the sale to Appellants was entered February 14, 1967 [Cl.Tr. 18]. Escrow Instructions dated February 3, 1967 were attached to and incorporated into the Order Approving Sale. These Escrow Instructions were never signed and were subsequently superseded by signed Escrow Instructions dated February 10, 1967 [Cl.Tr. 33]. [See Appendix 1 hereto].

While the fraudulent conveyance actions of the Reorganization Trustee against the University of America Foundation for recapture of the Hope Street property were pending, but prior to the delivery of the quitclaim deed in compromise, the University of America Foundation entered into a parking lot lease with Charter Auto Parks covering approximately the North half of the property. Because Appellants desired to operate the entire property as a parking lot and required possession of the entire premises upon close of escrow, John N. Frolich, in his dual capacity as attorney for the buyers, and as attorney for the University of America Foundation, and

its president, Charles Simmons II, inquired of Simmons about the status of the Charter Auto Parks tenancy. Frolich was advised by Simmons that the lease between University of America Foundation and Charter Auto Parks had a 30-day cancellation clause in the event the property was sold to others. Frolich so advised the Trustee's counsel. Inasmuch as neither the Trustee nor Frolich had seen a copy of the Charter Auto Parks lease and were depending upon the information furnished by Simmons, a condition was placed in paragraph 1 on page 2 of the Escrow Instructions that seller believed that the only lease on the Hope Street property contained a 30-day cancellation clause but the escrow was expressly conditioned upon the existence of such a cancellation clause [Cl.Tr. 35]. [Appendix 1 hereto].

Subsequent to the execution of the Escrow Instructions of February 10, 1967, attorney Frolich provided the Reorganization Trustee with a copy of the parking lot lease which had been executed January 20, 1966 by Charles Simmons II, as president of University of America Foundation. It provided for a three-year term without any provision for cancellation [Cl.Tr. 125]. Upon learning that the lease did not contain a cancellation clause, the Reorganization Trustee made demand upon Charter Auto Parks to surrender possession on the ground that the University of America Foundation had no authority to execute the lease during the pendency of the fraudulent conveyance litigation. That demand was refused, but in a

further effort to obtain possession and permit completion of the sale escrow, the Trustee filed an Application on February 13, 1967 for an Order compelling the Charter Auto Parks to surrender the premises [Cl.Tr. 102]. Charter opposed the Trustee's Application, denied that the Reorganization Court had jurisdiction to determine the validity of the lease and sought $20,000 damages against the Reorganization Trustee [Cl.Tr. 128]. When the attempt of the Trustee's counsel to work out a settlement of the tenant's claim to possession failed, counsel immediately advised Appellants' attorney of the results of the meeting in the letter dated and mailed March 23, 1967 [Cl.Tr. 109]. [Appendix 2 hereto].

The letter of March 23, 1967 is an important document in these proceedings. By that letter, Frolich was advised that the Trustee would be unable to deliver possession of the parking lot within a reasonable period of time and that, accordingly, the Trustee would be required to refund the deposit of $27,500 previously made by the buyers on account of the purchase price. The letter stated: "Please advise me on or before 5:00 p.m., March 30, 1967, whether the buyers will accept the property subject to whatever rights have been created in Charter Auto Parks or their successors by reason of the lease of January 20, 1966." No reply was received to the letter of March 23, 1967 by the deadline of March 30, 1967, but in a letter dated April 13, 1967 (received April 14, 1967), Frolich advised that he would recommend that his clients

close the escrow and take title provided the Reorganization Trustee proceeded diligently with an action against Charter Auto Parks to obtain possession of the parking lot [Cl.Tr.116]. [Appendix 3 hereto]. Appellants never unconditionally accepted the property subject to the Charter lease.

The Trustee's counsel deemed the duty to continue litigation against Charter Auto Parks burdensome to the estate and recommended to the Trustee that the sale with Appellants be terminated in accordance with paragraphs 1, 3 and 4 of the Escrow Instructions of February 10, 1967 [Cl.Tr. 113, 114]. [Appendix 1 hereto].

Under the provisions of paragraph 3 of the Escrow Instructions, if the buyers were ready to close the escrow, but the seller was unable to close the escrow, then the further accumulation of interest charges on the Scottish Rite Foundation deed of trust and the accumulation of taxes would have to be borne by the seller rather than the buyer. Because that potential burden could eliminate the small equity of the estate over encumbrances, it was expressly provided in paragraph 3 that:

> "Seller shall have the right to abandon this escrow if he determines that he cannot deliver possession of the parking lot within a reasonable period of time to buyer. In that event, there shall be no liability on the part of the seller except to pay escrow and title

expenses incurred and the seller will be required to return to the buyer the sum of $27,500 previously deposited ..."

The Trustee having concluded that the obligations for continuing the litigation and for interest and taxes were too burdensome, instructed his counsel to obtain authority from the Reorganization Court to return to Appellants the deposits theretofore made (of the $27,500 good faith deposit, $7,500 had been deposited with the Trustee and the balance of $20,000 had been deposited with the escrow at the Hollywood National Bank). Accordingly, on April 25, 1967, counsel prepared the Application for Order authorizing termination of the pending sale escrow and reimbursement of the sale deposit (filed April 26, 1967) [Cl.Tr. 27]. On April 26, 1967, the Reorganization Court entered its ex parte Order which authorized the Trustee to terminate the pending sale escrow and directed the Special Master to hear and consider, on May 1, 1967, the offer of Morris Greenstein of $290,000 subject to the Charter Auto Parks lease, and any other offers which might be made. [Cl.Tr. 23]. No prior notice of the Trustee's Application for the Order of April 26, 1967 was given to attorney Frolich, but on the same day that the Order was entered, Trustee's counsel advised Frolich of the Application and furnished a copy to him [Cl.Tr. 118]. On April 26, 1967, the Reorganization Trustee's counsel advised the Trustee to immediately return to Appellants the $7,500 deposit previously

made [Cl.Tr. 119] and advised the Hollywood National Bank that the seller was abandoning the escrow, that the escrow was terminated, that the funds on deposit should be returned to Appellants without charge, deduction or offset and that all escrow charges were to be billed to the Reorganization Trustee for payment by the estate [Cl.Tr. 120]. Copies of all of the foregoing letters were mailed to Appellants' attorney on the dates the letters bear. Payment of the escrow charges by the Reorganization Trustee was exactly in accordance with paragraph 4 of the Escrow Instructions of February 10, 1967 [Cl.Tr. 114] which provided:

> "In the event that this escrow fails to close due to any default or inability of the seller to deliver a good and marketable title or any other default on the part of the seller, then seller's sole responsibility to buyer shall be the return of buyers' deposit of $27,500 without offsets or costs and seller agrees to pay all escrow and title charges incurred."

On the next day, April 27, 1967, Trustee's counsel forwarded a copy of the Order of April 26, 1967 terminating the sale escrow to the escrow officer and to Appellants' attorney [Cl.Tr. 122, 123].

At the hearing of May 1, 1967, held pursuant to the notice attached as Exhibit "A" to the Court Order of April 26, 1967 [Cl.Tr. 26], the property was reoffered for sale.

Attorney Frolich appeared on behalf of these Appellants as well as Charles Simmons, Charles Simmons II and University of America Foundation and engaged in a long colloquy with the Referee in Bankruptcy indicating Appellants' intention to cloud title to the property and prevent a resale [Rep.Tr., pp. 9-18]. After the colloquy ended, the Reorganization Trustee's counsel announced that the property was offered subject to the rights of Charter Auto Parks. After spirited bidding between Morris Greenstein and Joe's Auto Parks, the final and high bid of $309,000 was made by Joe's Auto Parks. Appellants did not make any bid. The sale of May 1, 1967 was approved and confirmed by the Court's Order of May 4, 1967 [Cl.Tr. 42]. No personal property was included in the sale to Joe's Auto Parks.

Based upon payment of a 2½% finder's fee, the gross proceeds to the estate from the Joe's Auto Parks sale was $301,275 as compared to gross sales proceeds from the Appellants of $270,000 ($5,000 of their purchase price was for personal property) and the burdens and unpredictable outcome of the litigation with Charter were eliminated.

On May 5, 1967, without notice to the Trustee, Appellants filed their Application for an Order vacating the Court's Order of April 26, 1967 and for an Order reinstating the prior sale Order of February 14, 1967 [Cl.Tr. 50]. The Reorganization Court issued an Order to Show Cause setting Appellants' Application for hearing on May 15, 1967 [Cl.Tr.

18]. On May 8, 1967, by Ex Parte Order, the Reorganization Court vacated its own Order of May 4, 1967 which had approved and confirmed the sale to Joe's Auto Parks [Cl.Tr. 83]. After a lengthy hearing before the Reorganization Court, the Order of May 22, 1967 was entered denying the Application of Appellants to reinstate their sale but instead reinstating with full force and effect, the Court's prior Order of April 26, 1967 which had authorized the termination of the sale to Appellants [Cl.Tr. 146].

Appellants filed a Motion for Rehearing on June 8, 1967 [Cl.Tr. 158] which was heard at length by the Reorganization Court on June 19, 1967 despite the fact that the Motion for Rehearing was filed 17 days after the entry of the Order of May 22, 1967 and, therefore, was not timely filed under Rule 59b of the Federal Rules of Civil Procedure. On June 21, 1967, the Court entered its Order denying the Motion [Cl.Tr. 182]. On August 3, 1967, the Reorganization Court entered its Order reinstating and approving the sale to Joe's Auto Parks [Cl.Tr. 190]. Joe's Auto Parks has deposited with the Reorganization Trustee $50,000 as a good faith deposit on account of its purchase price and the sale escrow is ready to close except for the cloud on title caused by these three pending appeals. Ullman and Simon refused to accept return of the money deposited by them with the escrow and with the Trustee.

The Escrow Instructions and the exchange of the letters

of March 23, 1967 and April 13, 1967 were accurately analyzed by the Reorganization Court at the hearing of May 15, 1967 on the Appellants' Application to reinstate the prior sale Order in this colloquy with Appellants' counsel [Rep.Tr. p. 32-35]: THE COURT:

"This contract has a rather peculiar sentence in it that you have overlooked entirely, it seems to me.

It says:

'Seller shall have the right of abandoning this escrow. He can determine that he cannot deliver possession of the parking lot within a reasonable period of time to the buyer.'

Now, that is the only thing he had to do - if he determined that he could not deliver within a reasonable period of time then he could abandon the contract.

He did determine that. He wrote you a letter on March 23d and he says:

'It appears unlikely that the possession of the parking lot can be delivered within a reasonable period of time.

'Accordingly it now appears that the Trustee will be required to refund the deposit of $27,500.'

The Trustee went one step further. He said:

'If you are willing to take the property "as is", subject to the lease, we will go through with the deal. Please advise me on or before 5 o'clock P.M. March 30, 1967.'

Here was an offer to go ahead with the escrow under these modifications. It was not accepted within the time set. I don't think that you have any cause of complaint here except the fact you did not reply to this letter.

So that it seems to me that regardless of the question of whether you were entitled to notice from the Bankruptcy Court the Trustee here had a right to abandon the escrow if he determined he could not deliver possession within a reasonable period of time. He determined that; he notified you; he abandoned the escrow.

Now, what more?

MR. FROLICH: Your Honor, if you will look at my answer to that - it says:

'We will take it now and litigate the issue of possession.'

THE COURT: You didn't say that at all.

MR. FROLICH: Yes, I did, your Honor.

THE COURT: He asked you for a 'yes' or

'no' answer. And what did you do? You started out and apologized and said:

'I have not been able to answer because I have been engaged in a long lawsuit.'

That's no legitimate excuse, is it?

MR. FROLICH: Your Honor, if you will look at the first part of his letter - he goes into reasons why he feels that he can't do it.

I have answered those reasons in my letter, and I end up by saying:

'We will take the title; we will close the escrow now.'

THE COURT: No, no, you don't say that. You say:

'It is our desire to complete the sale as set forth above.'

MR. FROLICH: And what do I say?

THE COURT: You say:

'It appears to me that arrangements can be made to clean up. Upon the escrow closing and title delivered to Ullman and Simon that you proceed with your action to obtain possession of the parking lot in a diligent manner and I will do everything in my power to assist you in such litigation.'

You are trying to throw upon the Trustee the litigation of the parking lot. It seems to me

he lived up absolutely to the requirements of your escrow agreement.

And you didn't have any vested interest in this property - you don't have any vested interest in this property."

III

ARGUMENT OF THE CASE

By reason of the three Notices of Appeal, the Court now has before it the following three Orders:

1. The Order of the Reorganization Court filed April 26, 1967 authorizing the Reorganization Trustee to terminate a pending sale escrow and modifying a prior Order of the Reorganization Court of February 14, 1967 [Cl.Tr. 23].

2. The Order of the Reorganization Court filed May 5, 1967 denying the Application to reinstate the sale to Appellants [Cl.Tr. 146].

3. The Order of the Reorganization Court filed August 3, 1967 reinstating and confirming and approving the sale of May 1, 1967 to Joe's Auto Parks [Cl.Tr. 190].

Appellants have not set forth in their Brief a specification of errors as required by Rule 18 (2) (d). Nevertheless, Appellee will attempt here to respond to the contentions set forth under Paragraph II, sub-paragraphs A and B, of Appellants' Opening Brief and as set forth in Paragraph II, B 10 of the Addendum to Appellants' Opening Brief.

1.

Appellants contend that the Order of April 26, 1967 is void by reason of the Trustee's failure to give Appellants prior notice of the filing of the Application.

A. Even if it be conceded, _arguendo_, that Appellants were entitled, as a matter of right, to notice and to a

hearing on the Trustee's Application for authority to terminate the pending escrow and return to the buyers their deposit that error has been cured by the subsequent actions of the Reorganization Court. On May 5, 1967, without notice to the Reorganization Trustee, these Appellants filed an Application with the Reorganization Court for an Order vacating the Court's Order of April 26, 1967 and for an Order reinstating the prior sale Order of February 10, 1967. On May 5, 1967, an Order to Show Cause was issued ex parte on Appellants' Application and on May 8, 1967, the Reorganization Court issued an Ex Parte Order vacating its Order of May 4, 1967 which had approved and confirmed the sale of May 1, 1967 to Joe's Auto Parks. After a lengthy hearing before the Reorganization Court on May 15, 1967 (see Reporter's Transcript of 43 pages), the Court denied the Motion of Appellants and reinstated the Order of April 26, 1967.

Appellants filed a tardy Motion for Rehearing on June 8, 1967 and although the Motion was not timely under Rule 59b of the Federal Rules of Civil Procedure, nevertheless the Reorganization Court conducted another full hearing and then denied the Motion.

In short, even if Appellants had a right to prior notice of the Trustee's Application filed April 26, 1967, they were granted two hearings on that Application and, pending the full hearings, the Court suspended or vacated its prior Orders of April 26, 1967 and May 4, 1967. Appellants cannot, in

good faith, claim any lack of due process in these proceedings

B. Although the issue is moot because Appellants, in fact, were given a full hearing, nevertheless, the Trustee had no obligation or legal duty to seek permission from, or give notice to, Appellants of the Trustee's Application for authority to terminate and abandon the escrow and return the deposited funds. The Trustee could have advised the buyers and the escrow that the seller was terminating the escrow without obtaining an Order from the Reorganization Court, but, as a matter of caution, because the Trustee had received $7,500 as a deposit, Trustee's counsel recommended obtaining an administrative Order from the Court authorizing the return of the funds deposited with the Trustee and with the escrow.

Further, at the time of the Trustee's Application of April 26, 1967 and the Court's Order which is the subject of the first Notice of Appeal, the conditions for the close of the escrow had not been satisfied and Appellants had no right, title or interest in the property.

2.

Appellants contend that a sale by a Bankruptcy Court is a judicial sale, that public policy requires that judicial sales be final and that Federal Courts are required to follow State decisions on matters of general law. Appellee has no argument with any of those general propositions of law. None of the cases cited by Appellants concerning finality of judicial sales is relevant here because none of those cases

concerned a sale which was, by its explicit terms, subject to conditions precedent and conditions subsequent which, having failed to occur, caused the sale to fail.

That sales in the Bankruptcy Court may be conditional has been recognized by the textwriters and by the Courts. "It perhaps deserves re-emphasis that the order of confirmation may itself recognize that the sale is conditional on performance of certain obligations imposed on the purchaser or on other events identified in the order."

4A Collier on Bankruptcy, 14th. Ed., page 1175, fn. 66.

Appellants seek to ignore the express terms and conditions contained in the Escrow Instructions and have presented their case as though it involved merely the vacating or setting aside of an unconditional Order Confirming Sale, but "the rights and quantum of property acquired by the purchaser depend primarily upon the terms of the sale as ordered or agreed upon." [Emphasis added]

4A Collier on Bankruptcy, 14th. Ed., page 1198.

The instant case is similar in nature to that considered in Walker v. Harper, (CA 5 Cir. 1943), 133 F.2d 418, where the bankruptcy trustee agreed to sell a quantity of crude oil but at the time of the sale, the trustee did not have the tenders needed to move the oil from storage tanks and pipe lines. Under the sale terms, an effort was to be made to secure tenders, and as soon as they were secured by the

trustee, the buyer was to pay at a certain rate per barrel. Negotiations for tenders were not as successful as had first been anticipated, and several months passed with the oil in storage and deteriorating in value. Thereafter, the trustee negotiated with a new buyer for a sale of a portion of the oil at a higher price. The first purchaser filed a claim for loss of profits based on the difference between the original purchase price and the new sale price plus reimbursement of certain expenses.

The Court concluded that the sale was made on condition that tenders were to be obtained, and until tenders were secured, delivery of the oil could not be made to the first purchaser and he could not be made to pay for the oil. The Court held that title had not passed to the purchaser, that it had remained in the trustee and that the contention of the first purchaser that he was entitled to the proceeds of the second sale was without merit. See also Moss v. Mosser, (ED Ark.,1953), 115 F.Supp. 343.

This Court reviewed the power of the Court to set aside a confirmed sale even where the trustee failed to provide the explicit protection for the estate contained in the Escrow Instructions now before this Court when it decided Proctor & Gamble Mfg. Co. v. Metcalf, (9 Cir., 1949), 115 F. Supp. 207. At page 209, this Court stated the rule as follows:

"*** Where there are even slight circumstan-

ces which suggest that there is unfairness to the estate in bankruptcy, a careful consideration should be had on review and a confirmed sale should be set aside if necessary to rectify the situation. While, if Referee and District Judge agree, an appellate court will rarely interfere, the District Judge has the responsibility to see that a sale which leaves the estate unprotected should not be confirmed.

"There is a general policy which emphasizes the stability of judicial sales as of great importance in smooth and correct judicial administration. Balancing that, it is of overwhelming importance that the rights of creditors in a concern in bankruptcy should be protected and that a disposal of property on terms which violate the rule should not be permitted to stand."

3.

Appellants argue that they became the equitable owners of the real property by reason of the Court's Order authorizing the sale and the entry into the Escrow Instructions of February 10, 1967. Even if that were to be conceded, arguendo, it would seem to have no relevancy to these proceedings, except perhaps with respect to the standing of Appellants to

receive notice of the Trustee's Application for authority to terminate the escrow. Inasmuch as Appellants were granted full relief from that Ex Parte Order, its entry, without notice to them, is irrelevant.

Nevertheless, it should be noted that the California Supreme Court stated, in Los Angeles High School District v. Quinn, (1925) 195 Cal. 377, 383, "Where a deed is placed in the hands of a third person, as an escrow, with an agreement between the grantor and grantee that it shall not be delivered to the grantee until he has complied with certain conditions, the grantee does not acquire any title to the land, nor is he entitled to a delivery of the deed until he has strictly complied with the conditions. (Dyson v. Bradshaw, 23 Cal. 528, 536.) If he does not comply with the conditions when required, or refuses to comply, the escrow-holder cannot make a valid delivery of the deed to him. (McLaughlin v. Clausen, 85 Cal. 322, 327 [24 Pac. 636].)"

4.

Appellants contend that because the Order of February 14, 1967 had become final, the Court was powerless to subsequently modify it, vacate it or set it aside. This is a complete misconstruction of the Order and of the status of the parties. There was no desire on the part of the Trustee to appeal from the Order entered February 14, 1967; that Order was free of error when entered, but by reason of the subsequent failure of the express conditions, further Orders

were sought by the Trustee in order to avoid any apparent clouds on title and in order to keep the record clear with respect to the return of Appellants' deposit and in order to consummate the second sale.

The power of the Court to modify and vacate its sale Orders is unquestioned. See, for example, In Re Pure Penn Petroleum Co., (2 Cir., 1951), 188 F.2d 851.

5.

Appellants contend that the Trustee waived the power to cancel Appellants' escrow, but no evidence was introduced to support such a contention.

Appellants did not present in their pleadings or in any evidence introduced before the Court below, issues with respect to waiver or estoppel. See the Application of Ullman and Simon for Order to Show Cause filed May 5, 1967 (Cl.Tr. 50]. In fact, Appellants did not introduce, purport to introduce or attempt to introduce any witnesses or other evidence of any kind in the course of the hearing of May 15, 1967 on their own Application and Order to Show Cause of May 5, 1967. It is elementary that a question which was neither pleaded nor presented to the Trial Court cannot be considered for the first time on appeal. Stephens v. Arrow Lumber Co., (CA 9 Cir. 1966), 354 F.2d 732.

A similar claim of estoppel and waiver made against the Trustee in Moss v. Mosser, (ED Ark. 1953), 115 F.Supp. 348, 349 was rejected, the Court stating that waiver involves both

knowledge and intention, and estoppel requires that an innocent party be induced by the fault of the other party to change his position for the worse in such manner that it would operate as a virtual fraud to allow the party to whom he has been misled to assert the right in the controversy.

It is the recognized rule in California that "... the vendors right to declare a forfeiture is not waived by merely delay in declaring it, by forebearance, by willingness to accept overdue payments ... Nor is it waived ... by failing to make a protest against acts of the purchaser now required by the contract ... and it has been held that an unaccepted proposal by the purchaser of certain terms and conditions on which default would be waived does not operate as a waiver by the vendor." 50 Cal. Jur.2d, Vendor and Purchaser §245, p. 308,309. See, for example, Champion Gold Mining Co. v. Champion Mines (1912), 164 Cal. 205, 128 P. 315; Kelso v. Ulrich (1945), 67 C.A.2d 698, 155 P.2d 407.

6.

In the Addendum, Appellants contend that the three Orders concerning the sale were void for failure to comply with Bankruptcy Act §§206 and 208.

No such contention was made in the Court below and, accordingly, it cannot now be presented for the first time on appeal.

§206 makes no reference to the right of the parties there named to notice, but is concerned only with the right

of such parties to be heard. Bankruptcy Act §116 (3) (11 U.S.C. §516) makes specific provision with respect to the notice to be given for the sale of property:

> "Upon the approval of a petition, the judge may... (3) authorize a receiver or a trustee or a debtor in possession, upon such notice as the judge may prescribe and upon cause shown, to lease or sell any property of the debtor, whether real or personal, upon such terms and conditions as the judge may approve;".

With respect to each of the Orders entered, the Court did, in fact, follow exactly the provisions of §116 and the Court, by appropriate Order, prescribed the form of notice and the persons to whom notice should be sent. It is unquestioned that the authority provided by §116 includes the power of the Reorganization Court to authorize a sale without any notice. See, for example, 11 Remington on Bankruptcy, §4509 at page 223 where it is stated:

> "The notice requirement under §116 (3) is 'upon such notice as the judge may prescribe'. This permits an immediate sale or lease without any notice, though this should be done only in unusual cases."

A thorough analysis of the applicability of §206 is contained in <u>6A Collier on Bankruptcy</u>, 14th. Ed., Paragraph 9.23, at page 307 through 309, where it is stated that §206

does not of itself grant a right to notice of all steps taken in the reorganization; that a contrary construction would result in much unwarranted difficulty and expense; that the requirements for notice in Chapter X have been constructed along more flexible lines; and that the specific provisions in Chapter X state when notice shall be given and the persons to whom notice shall be given.

As Collier has observed: "Thus those matters deemed by Congress to be of paramount importance specifically require notice to the parties included within §206; in other situations, the question of notice rests in the discretion of the Judge, to be exercised either as to whom notice shall be given and the form thereof if notice is required by the statute without further specification, or as to whether notice shall be given at all and to whom, etc., in cases where Chapter X is silent." [Emphasis added]. At page 308.

Apparently, Appellants contend that as buyers they can complain of an alleged failure to give notice to the Securities and Exchange Commission. The Securities and Exchange Commission's senior attorney assigned to this case was apprised of all of the Trustee's actions in connection with the sale of the Hope Street property, specifically including the sale Order entered February 14, 1967 and the subsequent Orders, and Trustee's counsel was in constant communication by telephone and correspondence with counsel for the Securities and Exchange Commission. The Securities and

Exchange Commission has not objected in any manner whatsoever to the Orders now on appeal and these Appellants have no standing to complain on behalf of the Securities and Exchange Commission.

7.

Appellants have contended that they are entitled to specific performance because they were involved in a contract concerning real property, apparently in the belief that this is the <u>only</u> element of proof necessary to obtain that extraordinary equitable relief. It is, however, elementary that specific performance is not a matter of obsolute right but rests within the sound discretion of the Court and is to be granted only in accordance with established principles of equity with reference to facts of the particular case.

<u>Pasqualetti v. Galbraith</u>, (1962), 200 C.A.2d 378, 382.

The contract in question, which consists of the escrow instructions of February 10, 1967 and the Court Orders entered in connection with the sale, cannot provide the basis for Appellants' claim of specific performance because of lack of mutuality and the failure of the consideration and the circumstances of the contract to satisfy the conscience of the Court.

California Civil Code §3386

<u>Moore v. Tuohy</u> (1904), 142 Cal. 342, 75 Pac. 896

<u>Paratore v. Perry</u> (1966), 239 C.A.2d 384, 387

SUMMARY AND CONCLUSION

The United States District Judge, acting as the Reorganization Court, gave two full hearings to Appellants and thereafter entered the Order of May 22, 1967 denying the Application of Appellants, dismissing the Order to Show Cause and adjudging and decreeing that the Appellants had no right, title or interest, lien, charge or encumbrance in the Hope Street real property. No evidence was introduced in the course of the two hearings or in the course of any other hearing in support of any of Appellants' contentions. The conditions of the escrow were not satisfied by Appellants; they made no offer to accept the property subject to the parking lot lease until the hearing of May 1, 1967 when Appellants learned that other parties were interested in the property and would pay $309,000.00 for it. Only when Appellants realized that they had a potential profit of more than $39,000 on a resale of the property, did they show a sudden and new interest in complying with the terms of the sale, but they displayed no such interest prior to the formal notice by the Trustee to the escrow company and to the buyers that the escrow was being terminated.

The agreement between the Reorganization Trustee and these Appellants contemplated the possibility of the very problems that arose here and provided explicitly for the results which should flow upon the occurrence of the events. Appellants having failed to convince the trial Court that it

should rewrite the contract for their benefit, now ask that the Appellate Court ignore the express provisions which are not to Appellants' liking and substitute therefor new terms, conditions and covenants.

In view of the failure of the Appellants to introduce any evidence at any stage in the proceedings and their reliance upon issues so patently sham as the alleged lack of due process, this appeal should be deemed by the Court to be frivolous and sanctions accordingly imposed upon Appellants as provided by the rules of Court. Appellee prays that the Court enter its Order affirming and approving the Orders of the United States District Court which are the subject of the three appeals.

Respectfully submitted,

GENDEL, RASKOFF, SHAPIRO & QUITTNER

By: Arnold M. Quittner
Arnold M. Quittner
Attorneys for Appellee, Kyle Z. Grainger, Jr.

APPENDIX 1

Superseding previous instructions which are hereby cancelled, null and void.

HOLLYWOOD NATIONAL BANK

Page 2

ESCROW DEPARTMENT
ESCROW INSTRUCTIONS

Escrow No. 363-GB February 10, 1967

To Hollywood National Bank

These instructions are executed simultaneously with the original escrow instructions of even date, and are made a part thereof.

1) Prior to close of escrow seller will deliver into escrow all leases in respect of subject property for delivery to buyer at close of escrow, with executed assignments in buyer's favor. As a matter of record only with which escrow holder is not to be concerned, the following is entered herein at the request of the parties: "Seller believes that the only lease on the subject property in effect at the present time is a lease between seller's predecessor in title and the Parking Lot Operator, and that said lease contains a cancellation provision providing that any new purchaser of said property may cancel said lease upon 30 days written notice. The offer to purchase subject property is conditioned upon a 30 day cancellation clause in said Parking Operator's Lease."

2) Buyer has heretofore paid to seller, outside of this escrow the sum of $27,500.00. In the event buyer fails to deposit the balance of the funds within 30 days from date hereof, and provided seller has performed everything required of him in order to close this escrow, then in that event, this escrow may be extended for an additional 90 days at the sole option of the buyer by written notice to escrow holder and to seller, but upon buyer so extending this escrow, seller shall be entitled to apply to interest on the note secured by first trust deed of record, and taxes accruing during the escrow period such portion of the $7,500.00 deposit retained by seller outside of escrow, as may be required on a pro-rata basis up to the actual date of closing this escrow. The maximum liability of buyer for said proration of the aforesaid interest on the first trust deed and taxes shall not exceed $2,000.00 per month. In the event

that this escrow fails to close within the additional 90 day period due to any default on the part of the buyer, then in that event this escrow shall be deemed terminated and all documents deposited by seller shall be returned to seller. The following is entered herein at the request of the buyer and seller as a matter of record only with which escrow holder is not to be concerned: "In the event of such aforementioned termination seller shall retain the balance of said $27,500.00 deposit as liquidated damages and neither buyer nor seller shall thereafter have any claims, demands or causes of action, one against the other, nor shall buyer have any right, title or interest, lien, charge or encumbrance in or to or against said real property. The purchase of the personal property is conditioned upon the buyer completing the purchase of the real property and likewise, the purchase of the real property is conditioned upon the buyer completing the purchase of the personal property. With respect to the right of seller to apply to interest and taxes a portion of the $27,500.00 deposit as provided herein, to the extent of such application, the seller must be reimbursed prior to close of escrow so that at close of escrow the seller will have not less than $27,500.00 on hand. As an example, in the event that the escrow is extended beyond the initial 30 days and into the additional 90 day period, and if, during said 90 day period, the seller is entitled to apply to interest and taxes the total sum of $5,000.00 from the deposit so that the deposit is reduced to $22,500.00, then buyer must, prior to close of escrow, pay to seller an additional $5,000.00 to bring the deposit back up to the original $27,500.00 level."

3) In the event that buyer is ready to close this escrow within the initial period of 30 days or in any extended period as set forth in paragraph 2 above, and seller is not able to deliver possession of the parking lot premises to buyer at the time when escrow is ready to be closed by buyer by the deposit of the balance of the funds due from him, then it is agreed that seller and not buyer will be charged with the pro-ration of interest on the first trust deed and taxes from that period of time when the escrow could have been closed by the buyer until the time when the escrow actually closes. Seller shall have the right to abandon this escrow if he determines that he cannot deliver possession of the parking lot within a reasonable period of time to buyer.

/////

Superseding previous instructions which are hereby cancelled, null and void.

HOLLYWOOD NATIONAL BANK

Page 3 ESCROW DEPARTMENT
ESCROW INSTRUCTIONS

Escrow No. 363-GB February 10, 1967

To Hollywood National Bank

These instructions are executed simultaneously with the original escrow instructions of even date, and are made a part thereof.

3) Continued from page 2
In that event there shall be no liability on the part of the seller except to pay escrow and title expenses incurred, and the seller will be required to return to the buyer the sum of $27,500.00 previously deposited with Kyle Z. Grainger, Jr., the Trustee herein, of which the sum of $7,500.00 has been retained by said Kyle Z. Grainger, Jr., and the balance of $20,000.00 has been deposited into this escrow."

4) In the event that this escrow fails to close due to any default or inability of the seller to deliver a good and marketable title or any other default on the part of the seller, then seller's sole responsibility to buyer shall be the return of buyer's deposit of $27,500.00 without offsets or costs, and seller agrees to pay all escrow and title charges incurred.

APPENDIX 2

March 23, 1967

2340/7

John N. Frolich, Esq.
727 West Seventh Street
Los Angeles, California

Re: Human Relations Research Foundation (University of America Foundation)

Dear Mr. Frolich:

As you know, I met with the attorneys for Charter Auto Parks this morning to discuss the relinquishment of possession of the 929 South Hope Street parking lot. Irving Sulmeyer could not attend the meeting, and Robert Alberts, of his office, sat in on the meeting together with Wolk and Karno. Their position was apparently adamant with respect to voluntarily relinquishing possession. They insisted, among other things, that the Reorganization Estate was in no position to complain about the lease of January, 1966 with University of America because the Trustee had joined in obtaining an Order for application of the rental proceeds to the Scottish Rite Foundation and that this act amounted to an acceptance of the lease. It appears to me at this moment that there will be no voluntary surrender of the premises and that Charter is going to rely upon the lease of January 20, 1966 which was executed by Charles Simmons II as President of University of America Foundation and against which Simmons received $2,200 as payment for the 35th and 36th months of the term. Unfortunately, there was no provision in the lease for cancellation upon sale of the property. Under the existing circumstances and in view of the apparent intent of Charter Auto Parks to litigate the matter, the Trustee now advises you on behalf of the buyers (George Ullman and Joe Simon) that it appears unlikely that possession of the parking lot can be delivered within a reasonable period of time and, accordingly, it now appears that the Trustee will be required to refund the deposit of $27,500. Please advise me on or before 5:00 p.m., March 30, 1967, whether the buyers will accept the property subject to whatever rights have been created in Charter Auto Parks or their successors by reason of the lease of January 20, 1966.

////

John N. Frolich, Esq.
March 23, 1967
Page Two

It is particularly unfortunate that the reorganization estate has been placed in this position in view of my letter of December 18, 1964 to Charles Simmons II, a copy of which is enclosed herewith.

Very truly yours,

AMQ:pj
Enclosure

ARNOLD M. QUITTNER

cc: Honorable James E. Moriarty (w/encl.)
Kyle Z. Grainger, Jr., Esq. (w/encl.)

APPENDIX 3

Law Offices

John N. Frolich
Irving W. Kregal
James L. Lund

Cable Address:"Beajohn"

JOHN N. FROLICH
727 West Seventh Street
Los Angeles, California 90017
MADISON 2-8104

April 13, 1967

Mr. Arnold M. Quittner
Gendel, Raskoff, Shapiro & Quittner
Attorneys at Law
6380 Wilshire Blvd. -16th Floor
Los Angeles, California 90048

Re: Human Relations Research Foundation (University of America Foundation)

Dear Mr. Quittner:

Please excuse my not answering your letter of March 23, 1967 sooner, but as you know I have been engaged in a long trial in the Superior Court which I just completed yesterday and I have been unable to take care of this matter.

With reference to the position of Sulmeyer's office regarding the lease between University of America Foundation and Sulmeyer's clients, Wolk and Karno, it occurs to me and I have told Mr. Alberts that in my opinion the fact that the trustee joined in obtaining an order for application of the rental proceeds to the Scottish Rite Foundation, in no way precludes the trustee from contesting the validity of said lease.

As you will recall in the first place, if I remember my facts correctly the Second Trust Deed holder on the premises at 929 South Hope, had served a Notice of Sequestration of Rents on Charter Auto Parks, pursuant to their rights under their Second Deed of Trust. Charter Auto Parks was then legally liable to pay said sums directly to the Second Trust Deed holder. It was the Second Trust Deed holder who voluntarily gave up these funds to the First Trust Deed holder in order to preserve whatever interest and equity that the Second Trust Deed holder had in the property. As I understand it now and as I understand it at the time of that negotiated arrangement the bankrupt estate had never received any rents on said lease of Charter Auto Parks. Since I was instrumental in getting the Second Trust Deed holder to

Mr. Arnold M. Quittner April 13, 1967
Page 2

funnel these funds directly to the FirstTrust Deed holder (Scottish Rite Foundation), I fail to see how using money belonging to the Second Trust Deed Holder for his own benefit and to preserve his interest and equity in the property amounts to an acceptance of this lease by the trustee.

Further since you had put Charter Auto Parts on notice prior to the time that they executed the lease with University of America Foundation, it occurs to me that they would have no rights whatsoever in the matter.

Under the circumstances, it occurs to me that arrangements can be made between us that (1) the escrow closes and title be delivered to Ullman and Simon, and (2) that you proceed with your action to obtain possession of the parking lot in a diligent manner and I will do everything in my power to assist in said litigation.

I have advised my clients of the probability that even if there is a verdict in favor of the reorganization trustee in the bankruptcy court, there is always the possibility of a review and appeal. I pointed out to my clients, Ullman and Simon, that this may delay their obtaining actual possession of the property for some period of time. However, I recommended to them that they complete their sale of the subject property at 929 South Hope Street and close the escrow as soon as you are prepared to deliver title to them upon the agreement of the reorganization trustee that he will proceed diligently as outlined above.

Under the circumstances you are advised that it is our desire to complete the sale as set forth above.

Very truly yours,

JNF:ac JOHN N. FROLICH

cc: Honorable James E. Moriarty
Mr. Kyle Z. Grainger, Jr.
Mr. George Ullman

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United State Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Arnold M. Quittner

Arnold M. Quittner, Esq.

No. 22153
22153-A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GEORGE ULLMAN & JOE SIMON,
INTERESTED PARTIES,

Appellants,

vs.

KYLE Z. GRAINGER, JR., et al.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA.

APPELLANTS' SUPPLEMENTAL REPLY BRIEF

FILED

APR 12 1968

WM. B. LUCK, CLERK

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GEORGE ULLMAN, et al., Appellants, vs. KYLE Z. GRAINGER, JR., Appellee.		No. 22153 No. 22153A

APPELLANTS' SUPPLEMENTAL REPLY BRIEF

TO THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT:

An Ex Parte Order vacating a confirmed judicial sale must be reversed because the purchaser at a judicial sale must unquestionably be notified of the proceedings to set aside the confirmation, and inasmuch as no man may be divested of his rights of property without due process of law, notice to the purchaser is a jurisdictional prerequisite (Halliday v. Stuart, 151 U.S.229, 38 L. ed. 141, 14 S. Ct. 302). Moreover, failure to give notice to a purchaser has been held to be fatal even though the purchaser was the Clerk of the Court out of which the process for sale was issued and the Motion to Vacate it was filed (Ann. Cas. 1914 D758).

Appellants also contend that an Ex Parte Order vacating a confirmed judicial sale in bankruptcy must also be reversed on equitable principles since the Bankruptcy Court is vested with equity powers (B.A. Section 2(a).)

Appellants' recognize the right of a Bankruptcy Court to set aside a sale either before or after confirmation if it appears that the sale was entered into through mistake, inadvertance, or improvidence (Allen v. Union Transfer Co., 152 F2d 633). Appellants' contend, however, that the maxim "He who seeks equity must do equity" also applies in Courts of Bankruptcy and for that reason the "Order Modifying Order of February 10, 1967, filed April 26, 1967," must be reversed.

Although cases hold that Federal Rules of Civil Procedure 60 (b), wherein a party may be relieved from a final order "upon such terms as are just . . . , " is not applicable in bankruptcy because no order in bankruptcy is final until the whole proceeding has terminated, the equitable principles which Federal Rules of Civil Procedure 60(b) incorporates is applicable to bankruptcy (In the Matter of California Lumber Corporation, Bankrupt, 227 F. Supp. 63, 68).

Federal Rule of Civil Procedure Section 60(b) is based upon California Code of Civil Procedure Section 473 and this Federal Rule should be given the same construction as the California rule (U.S. v. Mutual Const. Corp., 3 F.R.D. 227; Fiske v. Buder, 125 F2d 841). Under California Code of Civil Procedure Section 473, California cases have uniformly held "that the trial court is without power to set aside an order involving judicial action and regularly made, and enter another and different order without notice to the adverse party." (Emphasis the Court's in Harth v. Ten Eyck,

16 C2d 829 at 834).

The Federal Rules of Civil Procedure are made applicable to bankruptcy by General Order in Bankruptcy No. 27. The purchaser of property in a bankruptcy proceeding is a party to that action (In re Strumbs Lane, 64 F. Supp. 731). When the trial court issued its Ex Parte Order Modifying the Order of February 10, 1967, without notice to Appellants herein, who were purchasers of the subject property in the bankruptcy proceeding and therefore parties to that action, the equity principles embodied in Federal Rule of Civil Procedure 60(b) and defined by California Code of Civil Procedure Section 473, were violated. Moreover, the above-mentioned Ex Parte Order violated the spirit of General Order in Bankruptcy No. 23 which requires notice to parties in interest of orders by referees not involving ministerial or administrative directions (Armstrong v. Fisher, 224 F97; Title & Trust Co. v. Wernick, 68 F2d 811; In re Cook, 28 F2d 521). Additionally, Ex Parte Orders vacating judicial sales frustrate the public policy designed to promote confidence in the integrity and stability of judicial sales.

Appellants contend that the Ex Parte Order, which is the subject of this Appeal, must be reversed because Appellants' fundamental rights of due process have been violated and because the equitable policies embodied in the

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equity powers of the Bankruptcy Court also have been violated.

Respectfully submitted,

JOHN N. FROLICH
Attorney for Appellants

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA }
COUNTY OF LOS ANGELES } ss.

GERALDINE HICKEY, being duly sworn, says: That affiant is a citizen of the United States and a resident of the County aforesaid, that affiant is over the age of eighteen years and is not a party to the within above-entitled action; that affiant's business address is 727 West 7th St., Los Angeles, Calif. 90017; that on April 10, 1968, affiant served the within APPELLANTS' SUPPLEMENTAL REPLY BRIEF on the following named parties by depositing a copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail, City of Los Angeles, State of California, addressed to said parties at the addresses as follows:

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C. J. ODENWELLER, ESQ.
Securities & Exchange Commission
450 Golden Gate Avenue
San Francisco, California

Geraldine Hickey
GERALDINE HICKEY

Subscribed and sworn to before me this 10th day of April, 1968.

John N. Frolich
JOHN N. FROLICH
Notary Public in and for said County and State

JOHN N. FROLICH
NOTARY PUBLIC-CALIFORNIA
PRINCIPAL OFFICE IN
LOS ANGELES COUNTY

My Commission Ex[illegible]

NO. 22153
NO. 22153-A

United States Court of Appeals
NINTH CIRCUIT

GEORGE ULLMAN, *et al.*,

Appellants,

vs.

KYLE Z. GRAINGER, JR.,

Appellee.

PETITION FOR REHEARING

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

NO. 22153
NO. 22153-A

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GEORGE ULLMAN, *et al.*,

Appellants,

vs.

KYLE Z. GRAINGER, JR.,

Appellee.

PETITION FOR REHEARING

To the Honorable Stanley N. Barnes, Circuit Judge; Walter Ely, Circuit Judge; and Russell E. Smith, District Judge:

Appellants, George Ullman and Joe Simon, interested parties, hereby petition for a rehearing, to reconsider the judgment entered in this cause on June 18, 1968, on the following grounds:

I

The Honorable Court Erred In Stating The One Question (Or Issue) Raised By The Three Consolidated Appeals In This Case.

A. The issue before this Court was not "the right of appellants Ullman and Simon to purchase some real and per-

sonal property which were assets of the Estate" (Slip Opinion p. 1). The issue is *whether the bankruptcy court had the power to vacate a final court order of sale, ex parte, without notice to the purchasers thereto, after the sale had been approved and confirmed by the court.*

B. The Honorable Court's opinion in this Cause, issued June 18, 1968, contains findings of fact and conclusions of law which should have been reached by the trial court after a hearing, duly noticed to all parties affected thereby, to vacate the judicially confirmed sale to appellants herein

II

Appellants Were Denied Due Process Of Law, And The Bankruptcy Court Acted In Excess Of Its Jurisdiction, When The Bankruptcy Court Vacated, Ex Parte, Its Order Confirming And Approving Sale To Appellants.

A. An *Ex Parte* Order vacating a Confirmed Judicial Sale, without notice to the purchasers at that Judicial Sale, violates Due Process as provided by the Fifth Amendment to the Constitution of the United States and is in excess of the court's jurisdiction. (See supporting authorities in Appellants' Supplemental Reply Brief, page 1.)

B. With all due respect to the Court, the Court must consider and rule on the issue of equitable conversion. By the great weight of authority in the United States, equitable conversion of realty into personalty occurs upon confirmation of judicial sales. (See collected cases in 66 A.L.R.2d 1266.)

1. Equitable conversion in this Cause entitled appellants to notice of the *Ex Parte* hearing of April 26, 1967, and a hearing thereon, in which the Order of February 10, 1967, con-

firming and approving the sale of the property in question to appellants was vacated. Appellants had substantial property rights in and claims to the property in question, and the *Ex Parte* Order of April 26, 1967, vacating the sale, without notice to appellants as the purchasers thereof, terminated, impaired, and modified those rights without due process of law.

2. Equitable conversion still occurs even if a confirmed and approved judicial sale is heavily conditioned. The Court's attention is directed to pages 18 and 19 of appellants' brief for supporting authorities. Moreover, it was the duty of the bankruptcy court, and not the Trustee, upon a hearing, duly noticed to all affected parties, to determine whether conditions of the judicially confirmed and approved sale were complied with or waived, or whether "[T] his exchange of correspondence did not result in a modification of the contract created by the escrow instruction" (Slip Opinion, p. 5). *This was not done by the bankruptcy court.*

3. The Court's attention is directed to the unsigned Escrow Instructions dated February 3, 1967, which were the only Escrow Instructions attached and incorporated into the Court Order of February 10, 1967, confirming and approving the sale of the property in question to appellants (C.T. pp. 19-20). As found by this Court, the conditions contained therein were obviously made for the benefit of appellants. Due process of law entitled appellants to notice of the hearing to vacate the Final Court Order of February 10, 1967, which approved the judicial sale, and appellants were entitled to a hearing thereon, wherein appellants would have had the right and power to waive said conditions and proceed with the sale. *Appellants were not given this right, by virtue of the Ex Parte Court Order.*

C. The Trustee does not have the right to abandon a judicially confirmed and approved sale, at his own discretion, without approval of the bankruptcy court, after notice, and a hearing thereon, to the parties affected thereby.

1. To allow the Trustee to have discretionary power to abandon judicially confirmed sales would be to allow the Trustee to become the final arbiter of judicial sales, and would endow him with more power than the court itself has, a result which would completely destroy the sanctity and integrity of judicial sales.

2. Allowing the Trustee to have discretionary power to abandon judicially confirmed sales would be an invalid delegation by the bankruptcy court of its power to sell property of the debtor under Bankruptcy Act Section 116(3) (11 U.S.C. 516), which provides that the court has the power to sell any property of the debtor "upon such terms and conditions *as the judge may approve*" (emphasis added).

3. The Escrow Instructions dated February 10, 1967, are invalid under Bankruptcy Act Section 116(3), *supra.* The bankruptcy court has allowed the Trustee to execute escrow instructions subsequent to the Final Order of Sale of February 10, 1967, whereby the Trustee gave himself the power to terminate the Judicial Sale without approval by the bankruptcy court, and without notice, and a hearing thereon, to the parties affected thereby. The condition in the Escrow Instructions dated February 10, 1967, giving *the Seller the right to abandon the escrow if the Seller determined he could not deliver possession of the parking lot within a reasonable period of time to the Buyer (*C.T. p. 35*)* was not present in the Escrow Instructions dated February 3, 1967, and was not approved by the bankruptcy court and attached to and incorporated in the Final Order of Sale of February 10, 1967.

III

Appellants Were Purchasers Under A Judicial Sale And Had More Than A Mere Contractual Relationship With The Estate.

A. With all due deference to the Court, appellants had more than just a mere contractual relationship with the Estate (Slip Opinion,pp. 4-5). What is involved here is a final order of the bankruptcy court, confirming and approving the sale of real property belonging to the estate of the bankrupt, or, if you will, a judicial sale.

B. Assuming, *arguendo,* that appellants had only a contractual relationship with the Estate, then the *Ex Parte* Order of April 26, 1967 (C.T. pp.23-25), vacating the Order of February 10, 1967, which had confirmed and approved the sale of the property in question to appellants (C.T. pp.18-22), was a violation of Bankruptcy Act Section 116(1) (11 U.S.C. 516), which provides that the judge may permit rejection of executory contracts of the debtor, "*upon notice to the parties to such contracts . . .*"(emphasis added). Under Bankruptcy Act Section 70 (11 U.S.C. 110), title to rights in executory contracts of the debtor vests in the Trustee and in the Estate. Consequently, if appellants merely had a contractual relationship with the Estate, then by analogy, pursuant to and in accordance with Bankruptcy Act Section 116(1), *supra,* appellants were entitled to notice, as parties to the contract, of the hearing to reject their contract with the Estate.

CONCLUSION

Petitioners earnestly request that a rehearing be granted in this Cause, so that this Court may re-examine and reconsider substantial constitutional and federal questions and issues raised herein, especially in light of *Halliday v. Stuart,* 151 U.S. 229, 38 L.Ed. 141, 14 S.Ct. 302.

Respectfully submitted,

JOHN N. FROLICH

Attorney for Petitioners

CERTIFICATE

Rule 18-2(g)

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JOHN N. FROLICH, Attorney

STATE OF CALIFORNIA)
) ss.
County of Los Angeles)

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Los Angeles, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 215 West Fifth Street, Los Angeles, California 90013, that on AUGUST , 1968, I served the within PETITION FOR REHEARING - Ullman v. Grainger - No. 22153 and No. 22153-A) on the following named parties by depositing a copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Los Angeles, California, addressed to said parties at the addresses as follows:

GOLDMAN & GOLDMAN
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GENDEL, RASKOFF, SHAPIRO & QUITTNER
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C. J. ODENWELLER, ESQ.
SECURITIES & EXCHANGE COMMISSION
450 GOLDEN GATE AVENUE
SAN FRANCISCO, CALIFORNIA

I swear under penalty of perjury that the foregoing is true and correct.

Executed on AUGUST , 1968, at LOS ANGELES, CALIFORNIA.

Subscribed and sworn to before me
this day of , 1968.

Notary Public in and for the
State of California.

Dean-Standefer Company, 215 W. 5th, L.A. 90013 † 628-6898

NO. 22154

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CARL JESS HANSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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TOPICAL INDEX

TABLE OF AUTHORITIES

Statutes (cont'd)

NO. 22154

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CARL JESS HANSON,

Appellant,

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UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

I.

JURISDICTIONAL STATEMENT

This is an appeal from the order of the United States District Court for the Southern District of California denying appellant's motion to vacate sentence under Title 28, United States Code, Section 2255.

The District Court had jurisdiction by virtue of Title 28, United States Code, Section 2255. Jurisdiction of this Court rests pursuant to Title 28, United States Code, Section 1294 and 2255.

II.

STATEMENT OF THE CASE

On January 6, 1965, appellant was indicted in a three-count indictment which alleged the commission of three separate bank robberies [C.T.28].1/

1/ "C.T." refers to the Clerk's Transcript of Record.

Counsel was appointed for appellant. A psychiatric examination was requested by the defense and was ordered by the United States District Court for the Southern District of California [C.T.28].

On January 25, 1965, during a hearing in United States District Court, both parties submitted the matter upon the report of the psychiatrist, Dr. John D. Robuck, and the Court found that appellant was mentally ill but not legally insane and that appellant understood the proceedings against him and was properly able to assist in his own defense [C.T.28-29].

On the same date, appellant entered a plea of guilty to Count One of the indictment, which alleged that on or about September 8, 1964, in the Southern District of California, appellant, by intimidation, knowingly and wilfully took, from the person and presence of Suzanne Flinn, approximately $2,329, belonging to, and in the care, custody, control, management, and possession of, a savings and loan association whose accounts were then insured by the Federal Savings and Loan Insurance Corporation [R.T. 3-4]. 2/

Thereafter, on January 29, 1965, appellant was sentenced to the maximum period of custody and for a study under Title 18, United States Code, Section 4208(c). Additional psychiatric examinations were ordered after the

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2/ "R.T." refers to the Reporter's Transcript of Proceedings, which was included in the record upon appeal [Second page of Certificate of Clerk, Clerk's Transcript of Record]. As there is a duplication of page numbers in the Reporter's Transcript, all references will refer to the proceedings of January 25, 1965, unless otherwise noted.

study was completed. On July 20, 1965, at a second hearing upon questions of mental competency, the trial Court found that appellant was mentally ill but competent to stand trial and was able to cooperate with his counsel and to understand the nature of the offense. The sentence was then modified to a period of 15 years with eligibility for parole at any time under Title 18, United States Code, Section 4208 (a)(2) [C.T. 29-30; R.T. 2-4].

On March 2, 1967, appellant filed a motion to vacate sentence under Title 28, United States Code, Section 2255, alleging that he was mentally incompetent at the time of arraignment, plea, and sentence [C.T. 2, 4]. This motion was denied without a hearing on March 2, 1967 by United States District Judge James M. Carter. (The motion had previously been lodged with the Clerk on February 6, 1967) [C.T. 28, 31].

On March 20, 1967, appellant filed a petition for rehearing. This petition was denied on April 11, 1967 [C.T. 33, 48].

Appellant thereafter filed a notice of appeal [C.T. 49].

III.

ERROR SPECIFIED

Appellant specifies the following points upon appeal:

"I. Was appellant mentally incompetent at the time of arraignment, pleading, and sentence?

"II. Was appellant entitled to a full evidentiary and adversary Competency hearing pursuant to Sec. 4244 of Title 18, United States Code?

"III. Did the Court err in failing to rule on Constitutional aspects of Sec. 4244?

"IV. Did the Court err in failing to exercise Rule 28 of the F. R. Crim. P.?

"V. Did the method and extent of psychiatric examination meet the standard required?

"VI. Did the Court rely on Sec. 4208 (c) of Title 18, United States Codes, instead of on Sec. 4244?

"VII. Did the Court fail to recognize authorities cited in appellant's Sec. 2255 brief?

"VIII. Did the Court err in accepting a plea of guilty after a question of innocence was raised?

"IX. Did the examining psychiatrists err in reporting on <u>both</u> competency to stand trial and responsibility at time of alleged offenses?

"X. Did the Court abuse its discretion in holding appellant competent to stand trial?

"XI. Did the Court err in failing to cause the plea of guilty to be withdrawn?

"XII. Did the Court err in failing to rule on the proposition that due to actions taken by the U. S. Probation Officer the plea was not voluntary as required by Rule 11 of the Federal Rules of Criminal Procedure?

"XIII. Did the Court err in failing to make findings of fact and conclusions of law in its orders of March 2, 1967 (R. 28-31), and

April 11, 1967 (R. 48)?"

(Appellant's Brief, pp. 4-5).

IV.

STATEMENT OF THE FACTS

Appellant committed a robbery of the Central Federal Savings and Loan Association in San Diego, California, on or about September 8, 1964. He accomplished the robbery by handing a note to a teller or a young woman. The note stated, among other things, that appellant had a gun. The woman gave appellant approximately $2,329, and he left [R.T. 4-6].

A psychiatric examination was ordered at the request of the defense, and the psychiatrist, Dr. John D. Robuck, concluded that appellant was mentally ill but not legally insane, understood the proceedings against him, was properly able to assist in his own defense, and was not legally insane at the time of the alleged offenses. The report of Dr. Robuck was filed on January 19, 1965 [C.T. 28-29].

On January 25, 1965, a hearing was held upon the questions of mental competency, and the matter was submitted upon the psychiatrist's report by agreement of Government counsel and appellant's counsel [C.T. 28; R.T. 2]. The trial court found that appellant was presently mentally ill but not legally insane, that he understood the proceedings against him, and that he was properly able to assist in his own defense [R.T. 2-3].

On the same date (January 25, 1965), appellant entered a plea of guilty to Count One of the indictment and stated that he had committed the alleged robbery by using a note which began with the words, " I have a gun in

[illegible]

my shirt . . . ." [R.T. 3-6]. The prosecuting attorney announced that the Government was satisfied by a guilty plea to one count [R.T. 4].

After a period of study at Springfield Medical Center, appellant was returned to court. Additional psychiatric examinations by Dr. Robuck and Dr. Alfred L. Larson were ordered by the Court on June 16, 1965. The orders provided that the report and study from the Springfield Medical Center would be furnished to each of the examining psychiatrists. Dr. Robuck's report was filed on June 25, 1965, and Dr. Larson's report was filed on July 13, 1965 [C.T. 29-30].

Dr. Robuck stated that appellant was mentally ill but probably not legally insane, that he understood the proceedings against him, and that he was able to properly assist in his own defense [C.T. 29-30].

Dr. Larson stated that appellant was legally insane, was probably insane at the time of the commission of the alleged offense, and was able to comprehend the proceedings but unable to cooperate in his defense [C.T. 30].

The second hearing upon the question of appellant's mental condition was held on July 20, 1965. Appellant again was represented by counsel. The matter was submitted upon the medical reports. The court found that appellant was mentally ill but competent to stand trial at that time and at the time of plea, that he knew the nature of the proceedings, that he was able to cooperate with counsel, and that he was not legally insane at the time of the crime [R.T. 2-4, July 20, 1965].

Appellant's motion to vacate sentence was denied on March 2, 1967 [C.T. 28-31].

V.

ARGUMENT

A. THERE WAS SUFFICIENT EVIDENCE OF APPELLANT'S MENTAL COMPETENCE AT THE TIME OF ARRAIGNMENT, PLEADING, AND SENTENCE.

Appellant suggests that he was not mentally competent at the time of arraignment, pleading, and sentence. However, in ruling that appellant was mentally competent, Judge Carter relied upon the reports of Dr. Robuck, which reports were properly considered, since the matter was submitted upon the various reports during the hearings of January 25, 1965, and July 20, 1965 [R.T. 2-3; C. T. 28-30].

Judge Carter's findings of fact were adverse to appellant upon the questions of legal competence at the time of plea and time of sentence [R.T. 3-4, July 20, 1965].

"Findings of fact cannot be set aside by an appellate court unless <u>clearly erroneous.</u>"

<u>Hearn</u> v. <u>United States</u>, 194 F.2d 647, 649 (7th Cir. 1952) (Emphasis added).

> "The issues of fact raised by the motion to vacate the judgment and sentence and to withdraw the plea of guilty were for the trial court to resolve, and its decision may not be overturned on appeal unless it is clearly erroneous and constitutes an abuse of discretion."

Harris v. United States, 216 F.2d 953 (5th Cir. 1954).

Since the trial court's findings of fact were based upon the opinion of an expert, and since evidence upon appeal is viewed in the light most favorable to the prevailing party in the trial court, it is evident that the trial court's findings were not "erroneous."

B. APPELLANT WAS NOT DENIED THE RIGHT TO A FULL EVIDENTIARY AND ADVERSARY COMPETENCY HEARING.

It appears that appellant did not have an absolute right to a full evidentiary and adversary hearing upon the question of competency.[3/] However, appellant had two competency hearings with his counsel present to assist him. By agreement of the parties, the evidence was limited to the various reports of experts. [R.T. 2; R.T. 3, July 20, 1965]. A similar procedure was approved in Merrill v. United States, 338 F.2d 763, 766 (5th Cir. 1964).

A party may not be compelled to present evidence if he does not wish to do so. It is quite possible that appellant and his counsel desired a finding of competency, because appellant had the opportunity of settling the case with a plea of guilty to one of three separate bank robbery counts [R.T. 4; C.T. 28], thereby avoiding the problems described by appellant when he

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3/ Stone v. United States, 358 F.2d 503, 506 (9th Cir. 1966); Formhals v. United States, 278 F.2d 43, 48 (9th Cir. 1960); Institutes on Sentencing, 37 F.R.D. 155, 160 (1965).

states that "Movant faced three bank robbery indictments, and sixty years imprisonment - - a life sentence for a man of his age." (Appellant's Brief, p. 12).

> "A guilty defendant must always weigh the possibility of his conviction on all counts, and the possibility of his getting the maximum sentence, against the possibility that he can plead to fewer, or lesser, offenses, and perhaps receive a lighter sentence." Cortez v. United States, 337 F.2d 699, 701 (9th Cir. 1964).

Appellant contends that acceptance of "waiver" of the competency hearing was erroneous, citing Durham v. United States, 214 F.2d 862 (C.A. D.C. 1954). Durham does not fully support appellant's position. Furthermore, there was no waiver of the hearing in the instant case, as the matter was submitted upon the evidence, which consisted of medical and psychiatric reports. A similar procedure was approved in Merrill, supra.

Appellant states that he was entitled to an adversary hearing. He had not one, but two, adversary hearings upon the question. He was represented by counsel, who could have offered additional evidence had he desired to do so.

Appellant contends that he was not "present" at the competency hearings, apparently upon the theory that he was not mentally "presemt" because he was allegedly insane at the time. However, he cites no legal authority to support the extraordinary proposition that no hearing can ever be held upon an insane person, because he is entitled to be "mentally present" at the hearing, and cannot be "mentally present" because he is insane. Such a rule

would prevent the operation of 18 U.S.C.A. 4244. It obviously was not the intention of Congress to pass a silly statute. (This argument concerns appellant's claim that he was insane. The evidence credited by the trier of fact demonstrated that he was not insane).

C. THE LACK OF A RULING CONCERNING CONSTITUTIONALITY OF 18 U.S.C.A. 4244 DID NOT CONSTITUTE ERROR.

Appellant contends that the trial Court should have ruled upon the Constitutionality of 18 U.S.C.A. 4244, as the statute is "non-adversary" in character unless the psychiatric report indicates the need for a hearing. However, appellant has no standing to object to the alleged unconstitutionality of a provision of a statute which was not enforced against him. He had two adversary hearings upon the issues.

D. FAILURE TO APPLY RULE 28 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE DID NOT CONSTITUTE ERROR.

Appellant states that the trial Court violated Rule 28 of the Federal Rules of Criminal Procedure by failing to inform an expert psychiatrist of his duties by means of a "conference."

Assuming, arguendo, that Rule 28 applied to psychiatric examinations under 18 U.S.C.A. 4244 prior to the 1966 amendment of Rule 28, it is respectfully submitted that appellant was not prejudiced by failure to have a conference, as he had the opportunity of calling the psychiatric experts as witnesses and cross-examining them if he wished to do so. This procedure would have

cured any supposed defect in the failure to have a "conference." Since there was no prejudice, the error, if any occurred, falls within the confines of Rule 52(a), Federal Rules of Criminal Procedure:

"Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."

Furthermore, appellant did not make a timely request for a "conference." The request came in 1967 [C.T. 13, 25]. The hearings occurred in 1965.

E. THERE IS NO EVIDENCE THAT THE PSYCHIATRIC EXAMINATIONS WERE IMPROPERLY CONDUCTED.

Appellant asserts that the psychiatric examination by Dr. Robuck involved various defects, including the failure to have X-rays, brain wave tracings, electroencephalograms, Rorschach tests, etc. He states that the examination should have been postponed in order to obtain detailed records from Atascadero and Kansas. He claims that Dr. Robuck visited appellant for only 20 minutes. However, if appellant had any objections to the procedures which were used, he should have made a timely objection or should have utilized the procedures of summoning witnesses and cross-examination in order to obtain additional evidence, if appellant actually desired a finding of insanity and an indefinite commitment, rather than an opportunity to plead guilty to one of three bank robbery charges and gamble upon hopes of a light sentence.

It is a well-established rule that an issue must be raised in a timely fashion in the trial Court.

Ramirez v. United States, 294 F.2d 277,283 (9th Cir. 1961);

Stein v. United States, 166 F.2d 851, 855 (9th Cir. 1948), cert. denied, 334 U. S. 844 (1948).

Failure to object in 1965 also precluded a 1967 determination (by means of 28 U.S.C.A. 2255) of the propriety of various other 1965 procedures, including the alleged use of medical standards rather than legal standards, the alleged failure to advise Dr. Robuck to follow Ninth Circuit legal standards, the alleged failure to distinguish between "true, and 'apparent' rationality," and the lack of a "'legal adjudication for restoration to sanity.'" If these questions were important, they should have been raised during the 1965 hearings. It certainly is not the purpose of 28 U.S.C.A. 2255 to relitigate competency issues upon which two complete hearings have already been held.

Appellant also states that the trial Court should have inquired whether appellant knew that his acts were wrong, whether he could have refrained from doing the acts, and whether the rule of "emotional forces" might be applicable. However, these questions were not essential, as the issue was not innocence or guilt. The issue was whether appellant was presently competent. While there was some consideration of the question of sanity at the time of the crimes [C.T. 2-3], this question was not in issue.

F. THE TRIAL COURT DID NOT IMPROPERLY RELY UPON 18 U.S.C.A. 4208(c).

Appellant maintains that the trial Court attempted to substitute the procedure under 18 U.S.C.A. 4208 in order to obtain answers to the questions

involved in the 18 U.S.C.A. 4244 proceedings. The record does not support this contention. The hearing under 18 U.S.C.A. 4244 was completed and appellant was found to be competent four days before appellant was sentenced uner 18 U.S.C.A. 4208(c) [C.T. 29]. The latter statute provides for a study and report with recommendations concerning suitability for parole. The statute provides as follows:

> "This report may include but shall not be limited to data regarding the prisoner's previous delinquency or crominal experience, pertinent circumstances of his social background, his capabilities, his mental and physical health, and such other factors as may be considered pertinent."
>
> 18 U.S.C.A. 4208(c).

It is self-evident that the primary purpose of this statute is not to provide a psychiatrist study, but rather to furnish information that may be valuable upon the question of sentence or parole. Appellant's counsel originally requested the study [R.T. 6], so it is somewhat surprising that appellant claims that the trial Judge attempted to rely upon the study as "a fishing expedition . . . ." (Appellant's Brief, p. 21).

Judge Carter did not rely upon this report during the Section 4244 hearing, because the Section 4244 hearing was already completed at the time of the sentence under 18 U.S.C.A. 4208(c). At the second competency hearing, some consideration was given, without objection, to the report from the Springfield Medical Center [C.T. 30]. This was entirely proper, since the parties agreed to this procedure, and since the reports may have assisted

in arriving at the truth. There is no evidence to support appellant's novel suggestion that two psychiatric experts would be "confused" by the fruits of the Section 4208 examination.

G. THERE IS NO EVIDENCE THAT THE TRIAL COURT FAILED TO CONSIDER APPELLANT'S SECTION 2255 BRIEF.

There is no evidence supporting appellant's claim that the trial Court failed to recognize authorities cited in appellant's Section 2255 brief. Consequently, the contention has no merit in this appeal.

H. ACCEPTANCE OF A PLEA OF GUILTY DID NOT CONSTITUTE ERROR.

Appellant maintains that since Dr. Robuck's report allegedly stated that the crimes were committed in order to obtain relief from schizophrenic tendencies, this may have been a bar to the entry of a plea of guilty.

> (Appellee takes issue with appellant's interpretation of Dr. Robuck's reports and does not concede that appellant has accurately related the opinions of Dr. Robuck).

It is not surprising that appellant cites no relevant authority [4/] to support the novel suggestion that a trial Court cannot accept a guilty plea where the defendent admits guilt, desires to plead guilty in the presence of his attorney, and has an opportunity to dispose of two bank robbery counts by means of compromise. If the court had forced appellant to trial against his wishes, he could have stipulated that he was sane at the time of the crime alleged in Count One, so what would have been accomplished?

I. THE REPORT CONCERNING CRIMINAL RESPONSIBILITY AT THE TIME OF THE ALLEGED OFFENSES DID NOT CONSTITUTE ERROR.

Although it was not necessary to determine whether appellant was criminally responsible at the time of the alleged crimes, the trial Judge received the opinions of the psychiatrists upon this question [C.T. 29-30]. This was a salutary procedure, avoiding the possibility that the psychiatrists

---

4/ Appellant relies upon the dissenting opinion in United States v. Baldi, 192 F.2d 540 (3rd Cir. 1951). This dissenting opinion maintained that the defendant should have been allowed to withdraw a guilty plea, assuming the truthfulness of his allegations that his guilty plea was in exchange for promises allegedly broken by the court. It was claimed (at pp. 550-51, n.5) that the Court had promised that if certain records "raised an issue or doubt of Relator's sanity, the Court would consider withdrawal of the plea of 'Guilty'." This promise allegedly was broken.

would be required to withhold analysis of the question until many years later, had appellant been committed as presently incompetent. Had the question been left undetermined for several years, the psychiatrists might be forced to arrive at guesses, not conclusions, regarding criminal responsibility in the distant past. The additional psychiatric answers also would be helpful to all parties in determining whether they should proceed to trial.

However, appellant complains of this procedure, contending that the combination of the various questions would be "confusing" to the psychiatrists and to the trial Judge. There is no showing of confusion. There is no reason to believe that the distinguished trial Judge and the expert psychiatrists would have difficulty in considering the separate issues of present competency and criminal responsibility at the time of the alleged crimes.

J. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN HOLDING APPELLANT COMPETENT TO STAND TRIAL.

Appellant contends that the trial Court abused its discretion in holding that appellant was competent to enter a plea and be sentenced. He states that Dr. Robuck's report contained "an expression of doubt" and that Dr. Alfred Larson "was firm in his opinion" that appellant was insane (Appellant's Brief, p. 26). Appellant finds "doubt" in Dr. Robuck's employment of the term, "probably not legally insane" [C.T. 29]. In view of the vast uncertainties in the area of the mind, it is respectfully submitted that a psychiatric expert who speaks in terms of probabilities is entitled to far more respect, all other considerations being equal, than one who claims certainty

upon the question of present legal competence. Judge Carter's findings were fully supported by the evidence most favorable to the prevailing party.

K. FAILURE TO REQUIRE WITHDRAWAL OF THE PLEA OF GUILTY DID NOT CONSTITUTE ERROR.

The record does not indicate that there was any motion to withdraw the plea of guilty. In his contention that the plea should have been withdrawn, it is possible that appellant is repeating the arguments discussed under "H" above.

L. FAILURE TO RULE UPON THE PROBATION OFFICER'S EFFECT UPON THE GUILTY PLEA DID NOT CONSTITUTE ERROR.

Appellant argues that the trial court should have ruled upon his claim that the guilty plea was induced by the alleged promise of a probation officer (to appellant's wife) to the effect that a guilty plea would lead to the dismissal of two counts and "would open the way to immediate hospitalization and treatment." (Appellant's Brief, p. 24).

> "The important thing is not that there shall be no 'deal' or 'bargain', but that the plea shall be a genuine one, by a defendant who is guilty; one who understands his situation, his rights, and the consequences of the plea, and is neither deceived nor coerced."
>
> Cortez, supra, at p. 701.

It is a commendable rule that where a guilty plea is induced by

broken promises, made by persons in authority to make such promises, the plea may be set aside. That is not the case here. Appellant does not claim that the Government broke any promises.

M. THE ALLEGED FAILURE TO MAKE FINDINGS OF FACT AND CONCLUSIONS OF LAW DID NOT CONSTITUTE ERROR.

Appellant states that the failure to make findings of fact and conclusions of law in the orders of March 2, 1967, and April 11, 1967, constituted error. There is no showing of prejudice to appellant by the alleged failure to make such findings and conclusions, and there is no showing that findings were requested.

However, the findings and conclusions of the trial Judge can easily be discerned in the four-page March 2, 1967, order denying relief and dismissing the petition [C.T. 28-31]. On April 11, 1967, the trial Judge denied appellant's motion for re-hearing [C.T. 48]. There was no need for findings of fact and conclusions of law at that time.[5/]

5/ Appellant does not contend that he had the right to an evidentiary hearing upon the Section 2255 motion. However, he makes a brief reference to this matter, so it may be appropriate to cite Grill v. United States, 363 F.2d 32 (5th Cir.1966), holding that a Section 2255 hearing is not required after an 18 U.S.C.A. 4244 finding of mental competence, where there is no showing of a change in mental condition. There was no allegation of a change in mental condition in the instant case. Indeed, appellant claims that there is a presumption that he is still incompetent. (Appellant's Brief, p. 10).

VI.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the order of the Court below should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Phillip W. Johnson

PHILLIP W. JOHNSON

No. 22,162

IN THE

United States Court of Appeals

For the Ninth Circuit

JOSEPH E. SEAGRAM AND SONS, INC., THE HOUSE OF SEAGRAM, INC., McKESSON AND ROBBINS INCORPORATED, BARTON DISTILLING COMPANY and BARTON WESTERN DISTILLING CO., *Appellants*, vs. HAWAIIAN OKE AND LIQUORS, LTD., *Appellee*.	USDC HAWAII ~~No. 2418~~

Upon Appeal from the United States District Court for the District of Hawaii

OPENING JOINT BRIEF ON BEHALF OF APPELLANTS and APPENDIX

FILED

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

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Subject Index

Table of Authorities Cited

Cases

Pages

Statutes

Texts

No. 22,162

IN THE

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OPENING JOINT BRIEF ON BEHALF OF APPELLANTS

JURISDICTION

The jurisdiction of the District Court was based upon 28 USC §1337 and 15 USC §15. The jurisdiction of this Court rests on 28 USC §1291. The jury returned a verdict for plaintiff on April 25, 1967 (R. 295) and judgment was entered on June 2, 1967 (R. 307).

NOTE: References in this brief to "Seagram" will be to The House of Seagram, Inc. or to Joseph E. Seagram & Sons, Inc., or both as the context indicates; to "Barton" will be to Barton Distilling Company and Barton Western Distilling Co.; to "McKesson" will be to McKesson and Robbins, Incorporated; to "defendants" to all appellants and to "Hawaiian Oke" or "plaintiff" to Hawaiian Oke and Liquors, Ltd.

Notice of appeal was filed by McKesson on June 8, 1967 (R. 304), by Joseph E. Seagram & Sons, Inc. and The House of Seagram, Inc. on June 13, 1967 (R. 310) and by Barton on June 27, 1967 (R. 311). The time for docketing the record on appeal was extended by the District Court to September 6, 1967 (R. 348) and by this Court to November 6, 1967. The record was filed in this Court on October 31, 1967.

STATEMENT OF THE CASE

This is a treble damage action for an alleged violation of the Sherman Act.

Until 1965, plaintiff was a liquor distributor in Hawaii of products supplied by Seagram, Barton and others. In June and July 1965, Seagram and Barton each decided to substitute McKesson as their distributor and notified plaintiff.

On July 30, 1965, at a meeting attended by counsel, plaintiff's stockholders decided to institute this action against Seagram, Barton and McKesson for alleged conspiracy "to put the company out of business" in violation of the Sherman Act. (Ex. B-7.) Thereafter, plaintiff discontinued operations and liquidated its business.

The Parties

Joseph E. Seagram & Sons, Inc. is a manufacturer of alcoholic beverages. The House of Seagram, Inc., a wholly owned subsidiary, is the national distributor for these products. It conducts its marketing through

unincorporated sales divisions. Three divisions (Calvert, Four Roses and Frankfort) had one-year distributorship contracts with plaintiff that expired by their terms on July 31, 1965. (Tr. II: 453; Exs. S-10, S-11, S-12.)[1]

McKesson is a national wholesale distributor of drugs and liquors. Barton Distilling Company is a national manufacturer and supplier of alcoholic beverages, and Barton Western Distilling Co. is its wholly owned subsidiary. (Tr. II: 759.) Plaintiff had no contract with Barton; their oral arrangement was terminable upon reasonable notice by either party. (Tr. II: 503, 571.)

Background

In Hawaii, suppliers of alcoholic beverages have usually distributed to retailers through an exclusive wholesale representative, although dual distribution is used in a few instances. (Tr. IV: 1544-1546; VI: 2367-2368.)

In June 1965, plaintiff was the distributor for all Calvert and Four Roses products, all but one of the Barton products, and two of the three Frankfort products. (Tr. I: 145-46; II: 771; VI: 2330-31.) One Barton product and one Frankfort product were distributed by McKesson. (Tr. I: 163-64; VI: 2324.)

Changes of distributors are common in Hawaii. (Tr. II: 448, 504; Ex. S-18.) From 1952 to 1965, the Calvert distributorship was changed four times (Ex.

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[1]Roman numerals refer to the volumes and arabic numbers, the pages in the transcript.

S-18), and in the six years prior to 1965, the Barton distributorship had been changed twice (Tr. II: 504).

The 1965 Change of Distributors

For two years, Calvert officials were dissatisfied with plaintiff's sales and distribution. (Tr. II: 457-458; V: 2133.)[2] Plaintiff admitted the complaints (Ibid.) and that its distribution was poor, particularly on the outer islands. (Tr. II: 457-458; 616-618; V: 2135.)

McKesson was a satisfactory Calvert distributor on the mainland. (Tr. IV: 1439.) In May 1965, Arthur Murphy (head of Calvert) proposed to Joseph Cotler (vice president of McKesson) that McKesson distribute Calvert products in Hawaii. (Tr. IV: 1439-1440; VII: 2639.) McKesson, however, was the distributor of products of another House of Seagram division. (Tr. VII: 2639.) One of those products, Seagram 7 Crown, was the leading blended whiskey in Hawaii. (Tr. V: 2178-79.) Fearing that Calvert products would not receive adequate attention from the salesmen who sold 7 Crown, Murphy asked that McKesson form a separate sales force to handle Calvert lines. (Tr. IV: 1440-41; VII: 2639.)

Cotler expressed interest and arranged a meeting with his West Coast representatives, James Maloney and Abe Kauhane of Hawaii, upon their return from

[2]Fleischman of Calvert was unable to get Calvert at Wo Fat's, a restaurant owned by the Wongs, who also controlled and managed Hawaiian Oke (Tr. VI: 2531-2532). For convenience the names of the representatives of the parties who will be referred to are listed in Seagram's Ex. S-17 which is reproduced in the Appendix, p. i.

Europe. (Tr. II: 339; IV: 1440; VII: 2639.) On June 3, 1965, Cotler, Maloney and Kauhane met with Murphy and Fleischman of Calvert and Yogman (of Joseph E. Seagram & Sons, Inc.), (Tr. II: 339-342.)

The McKesson people viewed the proposal favorably but wanted to find out if they could get other brands for distribution by the new sales force, since Calvert alone would not justify the move. (Tr. II: 348-356.)

Cotler consulted officials of various suppliers seeking additional brands. Maloney returned to California about June 7, 1965 and telephoned Sheldon Friedman of Barton. Barton had not been aware of the New York meeting. (Tr. II: 396-397, VII: 2640-2641.)

McKesson was the Barton distributor in San Francisco. In mid-June 1965, Friedman and his superior, Sydney Weinstock, were on the West Coast (Tr. VI: 2279.) On June 14 or 15, they met with Maloney who solicited Barton for the proposed McKesson (Portside) house. (Tr. VI: 2279-80; Ex. P-18.) Weinstock expressed interest and told Maloney that he and Friedman would look into the matter in Hawaii in July. (Tr. VI: 2280-81.) Neither had been there before. (Tr. II: 830.)

Barton had been dissatisfied with plaintiff's chronic delinquency in paying its bills since 1962, and in October 1963 had decided to "make a jobber change". It was apprehensive about plaintiff's large balances owed, operational losses and huge deficits. (Exs. B-22, B-23, B-24, B-25, B-28, B-29, B-33, B-34, B-35, B-37, B-38, B-42, B-48, B-84, B-86, B-87, B-99, M-41, M-44; Tr. II: 825-829, 832-833; III: 849, 852, 911; IV: 1327-

1334, 1336-1337, 1366-1367, 1411-1414, 1420; VI: 2309, 2312.) Also Barton had long been dissatisfied with plaintiff's poor "products mix"; i.e., the high proportion of sales of unprofitable "white goods" (e.g., vodka and gin) over "brown goods" or "branded goods" (e.g., bourbon and scotch). (Exs. B-52, B-63, B-77; Tr. III: 849-851, 926-927; IV: 1372; VI: 2277-2278.)

However, Barton had been unable to find a substitute until McKesson's "second house" was proposed. (Tr. II: 764-765; III: 893; IV: 1337-1340, 1403-1404.)

On or about June 15, 1965, Maloney and Cotler conferred by telephone and decided to proceed with the new house, which eventually was Portside Distributors. (Tr. II: 358-359.) Cotler informed Murphy of the decision. (Tr. II: 357-358.)

On June 25, 1965, Calvert notified plaintiff that it would not renew its contract. (Tr. I: 146-47; II: 461; III: 1282.) On June 28, 1965, the Four Roses division gave plaintiff a similar notice. (Tr. I: 150; II: 463.) (Prior to learning of the Portside proposal, a Four Roses official had sent plaintiff a contract which was signed by plaintiff but never executed by Seagram. (Tr. IV: 1443-45).) On July 2, 1965, the Frankfort division also notified plaintiff that it would not renew its contract. (Tr. II: 464.)

On July 5, 1965, Friedman (of Barton) came to Hawaii. (Tr. II: 788.) The next day he visited plaintiff's warehouse and discussed business. (Tr. II: 789.) Plaintiff informed him of the Seagram change (Ibid.) That afternoon he visited Kauhane at Mc-

Kesson's office and was impressed with the facilities and operations there as compared with plaintiff's. (Tr. III: 848-849.) The following day Friedman called Weinstock. (Tr. II: 793.) They discussed the pros and cons of moving to McKesson, including the probable effect of the changes by Seagram on plaintiff's performance as distributor of Barton, and decided that it would be in Barton's interest to move to Portside. (Tr. II: 793, 796-797; III: 839.) That afternoon, Friedman notified plaintiff and McKesson of the decision, effective August 31, 1965. (Tr. II: 793-794.)

At no time was there any agreement or even any communication between any representative of Seagram and Barton. Plaintiff conceded that there would be no such evidence. (Tr. I: 22.) Nor was there any evidence that Seagram conditioned its dealings with McKesson on McKesson's obtaining Barton's business.

Plaintiff's History and Outlook

Plaintiff is a corporation managed and controlled by the Wong family. (Tr. II: 527, 530-32; VII: 2613-18.) While it was run by the father, Henry Wong, it prospered, but after World War II, it went downhill. In 1961 Henry Wong wrote his son Ted in Tokyo describing the plight of the business and urged him to return to take over. (Tr. I: 140-141.) Ted did and found the business "in a complete mess". (Tr. I: 141.) Henry Wong then fired his son David (who spent too much time on the golf course) and placed Ted in charge. (Tr. VII: 2616.)

Plaintiff experienced consistent losses in operations from $45,589 in 1959 to $18,767 in 1964 and $5,779 for the first six months of 1965, just prior to the change. (Exs. P-1, S-5.) Plaintiff showed small net profits in 1962-1964 and the first six months of 1965 when certain nonoperating income was included. However, this included rent from a leasehold that had been transferred from the corporation in 1963 to Thelma Wong (Henry's wife). Tr. I: 259-61; VII: 2607; Exs. B-14, B-14B, B-14C.)

Following the change, plaintiff made no real effort to obtain other lines. It approached no supplier to secure replacements. Its only attempts were telephone calls to two friends, liquor distributors in California. (Tr. I: 289-98.) Although the stockholders had directed management to try to sell the business, no steps were taken other than a meeting with a prospect "in the men's room" and supplying him with some financial statements. (Tr. I: 273-276, Ex. B-7.) After he saw the financial statements, the prospective purchaser was not interested. (Tr. I: 277.)

Plaintiff ceased selling to the public on October 1, 1965. (Tr. II: 574.) The corporation was not formally dissolved. (Tr. I: 222-223.) Its remaining lines, including Old Mr. Boston were turned over to Sam Wong, its sales manager who became associated with another company. (Tr. I: 303; IV: 1555; V: 2125.)

Proceedings Below

The court denied defendants' motion for directed verdict (R. 279-282) despite the failure of proof of

any agreement between Seagram and Barton, the absence of any evidence of an unreasonable restraint of trade and the absence of any competent evidence of damage. (Tr. IV: 1677; VIII: 3177, 3178.)

The court made the novel ruling that the unincorporated sales divisions of Seagram were entities (for purposes of the Sherman Act) and could conspire among themselves. (Tr. VII: 2762-2777.)[3]

The jury returned a verdict against all defendants of $65,000. (R. 295.) Defendants' motions for judgment n.o.v. or a new trial (R. 300-302) were denied. (R. 305.) Final judgment, together with interest, costs and attorneys' fees in the sum of $246,938.34 was entered. (R. 307.)

QUESTIONS PRESENTED

1. Was there sufficient evidence of either an unreasonable restraint of trade or a per se violation of the Sherman Act to support the verdict? (Error No. 1, App., p. ii.)

2. Did the court err in the admission or rejection of evidence on the issue of conspiracy in the following particulars?:

(a) Admitting the irrelevant hearsay testimony of Ted Wong as to Friedman's "guesses" on the reasons for the change (Error No. 2, App., p. ii);

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[3]Barton and Barton Western were regarded as one entity for the purposes of this suit (Tr. VIII: 3204).

(b) Admitting evidence of McKesson's performance after the change (Error No. 3, App., p. v.)

3. Did the court err in instructions on the issue of conspiracy as follows?:

(a) That an agreement or participation in a plan to establish Portside knowing that the result would be non-dealing with plaintiff constituted a per se violation (Error No. 5, App., p. ix);

(b) That the unincorporated divisions of Seagram were legally capable of conspiring among themselves (Error No. 6, App., p. xiii);

(c) That it was unlawful for Joseph E. Seagram & Sons, Inc. to instruct the unincorporated divisions of its subsidiary, The House of Seagram, Inc. to change distributors (Error No. 7, App., p. xv);

(d) That parallel behavior alone was sufficient to establish a conspiracy and refusing to instruct that such behavior does not prove a conspiracy unless the surrounding circumstances logically suggest joint agreement (Error No. 8, App., p. xvii.)

4. Did the Court err in the admission or rejection of evidence on the issue of damages?:

(a) Admitting profit projections and charts and permitting them to be explained by an accountant while at the same time refusing to allow cross-examination on the relevance of the charts (Error No. 9, App., p. xviii);

(b) Admitting evidence of casual expressions of interest by third parties in acquiring plaintiff's business (Error No. 10, App., p. xxiii);

(c) Admitting evidence of alleged out-of-pocket losses. (Error No. 11, App., p. xxiv.)

5. Did the Court err in giving and refusing instructions on damages? (Error No. 12, App., p. xxiv.)

SPECIFICATION OF ERRORS RELIED ON

The errors relied on are extensive and set out in the Appendix to this brief, pp. ii to xxxi, as approved by order of this Court, January 2, 1968.

SUMMARY OF ARGUMENT

The judgment should be reversed with direction to dismiss the complaint, since there was no evidence of an unreasonable restraint of trade or a per se violation of the antitrust laws. No question of price fixing is involved; all distributors must sell at the price listed with the Hawaii Liquor Commission. No question of monopoly is involved; it was charged but abandoned. There is no evidence that the changes of distributorships were made because of any unlawful or improper motive.

The court erred in admitting hearsay and speculative testimony of a "deal" among defendants and exhibits comparing Portside's performance after the change with Hawaiian Oke's before.

The court erred in charging the jury that it could find a per se violation under the circumstances shown; it permitted the jury to find a conspiracy among the unincorporated Seagram divisions alone to infer an agreement between Seagram and Barton on nothing more than parallel behavior.

The court erred in admitting evidence on damages consisting of exhibits representing the argument of counsel dressed up to look like expert testimony and testimony of casual expressions of interest by third persons in purchasing plaintiff's business.

The court erred in charging the jury on future profits, abstract expressions of interest in purchasing the business, out-of-pocket losses, and exhibits representing counsel's argument that were treated as expert testimony. It refused to instruct the jury not to consider rental income from the leasehold which had been transferred from plaintiff in 1963.

ARGUMENT

I. THE COURT ERRED IN RULING THERE WAS SUFFICIENT EVIDENCE OF A CONSPIRACY TO SUSTAIN A VERDICT

Plaintiff made no attempt to prove an unreasonable restraint. It chose to stand or fall on an alleged per se violation of the Sherman Act, labelling defendant's actions a "group boycott."[4]

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[4] As a learned judge has pointed out "the tyranny of tags and tickets" is no substitute for analysis. Cardozo, *Mr. Justice Holmes,* 44 Harv. L. Rev. 682, 688 (1931).

Plaintiff conceded the right of a supplier to change distributors unilaterally. *Ace Beer Distributors v. Kohn, Inc.,* 318 F.2d 283 (6th Cir. 1964), cert. denied 375 U.S. 922; *Walker Distributing Co. v. Lucky Lager Brewing Co.,* 362 F.2d 1008 (9th Cir. 1966), cert. denied 385 U.S. 976. It contended, however, that the three Seagram divisions and Barton had mutually agreed to use McKesson as their joint exclusive distributor and that this was a group boycott. The evidence did not establish a group boycott.

A. Plaintiff Failed to Prove Any Horizontal Agreement

Plaintiff's case must fail for lack of proof of any horizontal agreement. The Seagram divisions are not independent competitors and are not capable of conspiring among themselves, and there was no proof of any agreement between Seagram and Barton.

1. Unincorporated divisions of a single corporation cannot conspire among themselves

Unlike Section 2 of the Sherman Act, which forbids monopolization as well as conspiracies to monopolize, Section 1 does not prohibit unilateral restraints of trade; it proscribes only contracts, combinations and conspiracies, all of which require a plurality of actors.

When a corporation monopolizes an industry, the directors who authorize and participate in the corporate action may be in violation of Section 2. See, e.g., *Patterson v. United States,* 222 Fed. 599, 618 (6th Cir. 1915), cert. denied 238 U.S. 635 (1915). There is nothing unusual about holding directors liable for causing the corporation to commit an act that is un-

lawful when done by the corporation alone. However, it is contrary to logic and furthers no policy of the antitrust laws to hold that agents of one corporation can be guilty of conspiring among themselves to cause the corporation to act as it may lawfully do itself.

If a corporation may set its prices, it cannot be a a price fixing conspiracy for its officers to agree on the price. Under the ruling below, if the officers of Seagram divisions discuss prices, that would be a violation. If a corporation may choose its distributors, it cannot be a group boycott for its officers to agree to use one rather than another. If the plurality of actors demanded by Section 1 is satisfied by the acts of the officers of a single corporation, then virtually every corporate action would be a Section 1 violation. No decision could be made by intra-corporate consultation.

The courts have consistently held that the directors, officers, employees and agents of a single corporation cannot commit a Section 1 violation by agreements among themselves.

Nelson Radio & Supply Co. v. Motorola, 200 F.2d 911 (5th Cir. 1952), cert. denied 345 U.S. 925 (1953);

Goldlawr, Inc. v. Shubert, 276 F.2d 614 (3d Cir. 1960);

Poller v. Columbia Broadcasting System, Inc., 284 F.2d 599 (D.C. Cir. 1960), rev'd on other grounds 368 U.S. 464 (1962);

Deterjet Corporation v. United Aircraft Corp., 211 F.Supp. 348 (D. Del. 1962);

Kemwel Automotive Corp. v. Ford Motor Co., 1966 Trade Cases ¶17,882 (S.D. N.Y. 1966);
Johnny Maddox Motor Co. v. Ford Motor Co., 202 F.Supp. 103 (W.D. Tex. 1960);
Reines Distributors, Inc. v. Admiral Corp., 256 F.Supp. 581 (S.D. N.Y. 1966).

As stated in *Nelson Radio, supra:*

> It is basic in the law of conspiracy that you must have two persons or entities to have a conspiracy. A corporation cannot conspire with itself any more than a private individual can, and it is the general rule that the acts of the agent are the acts of the corporation. (p. 914.)

The unincorporated divisions of Seagram are not legal entities. They have no more independent existence than the clothing department and the furniture department of a retail store. They are nothing more than abstractions representing the internal structuring of The House of Seagram, Inc. They are simply groupings of Seagram employees charged with marketing Seagram products.

The divisions have no stockholders, no directors, no bank account, no assets and no liabilities. Their officers and employees are paid by Seagram. (Tr. VII: 2638.) Seagram determines the form and content of the distributor contracts. (Exs. S-10, 11, 12.) It freely shifts its employees from one division to another. (Tr. VI: 2505-2513; VII: 2621-2622.)[5]

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[5]Fleischman who in 1965 was a Calvert officer, at the end of the trial headed Frankfort. (Tr. VI: 2512.)

The divisions can neither sue nor be sued.[6] A finding that the divisions conspired is in reality no more than a finding that Messrs. Murphy, Wishny, Flint and their subordinates—all employees of Seagram—conspired to determine which distributor they thought would best serve the interests of Seagram.

The novel doctrine enunciated by the lower court applies with equal force to individual proprietorships. If A owns a bakery and puts B in charge of selling cakes, C in charge of cookies and D in charge of bread, any consultation and agreement among B, C and D as to the most efficient way to market A's products becomes a conspiracy. We cannot conceive that such a result was intended.

In *Times-Picayune Publishing Co. v. United States,* 345 U.S. 594 (1953), the Supreme Court commenting on the inapplicability of a conspiracy charge against one publishing company that operated two competing newspapers, said:

> In our view, no additional circumstances bring this case within §1. Though operating two constituent newspapers, the Times-Picayune is a single corporation, and the Government in the District Court abandoned a charge of unlawful concert among the corporate officers. (p. 626.)

Here, the court below stated:

> Normally such decisions are made "entirely independently" of any other division. If these au-

[6]The court below instructed the jury that if it found against any one or more of the divisions, the verdict was to be returned against Seagram.

> tonomous divisions deviated from their normal procedure, so that separate, decision-making "heads" acted in concert, they became subject to the proscriptions of the antitrust laws. (R. 328-329.)

Thus the court elevated deviations by corporate employees from "normal procedure" in their relations with one another to the level of a Section 1 violation.

The court did not even find a violation of corporate policy—only "normal procedure." It quoted the testimony of Seagram officials to the effect that each division customarily makes its own decisions in matters of marketing (R. 325-328), but omitted the testimony that the division heads of Seagram were free to discuss their respective distributorships, as was made clear by Edgar Bronfman, president of Joseph E. Seagram & Sons, Inc.:

> Q. Apart from whether they changed or not, do you know whether the company has any policy on the subject of whether or not the heads of the companies (i.e., divisions) may confer with each other on the subject of pricing?
>
> Mr. Bronfman: Yes, they may.
>
> Q. Are they free to confer with each other on the subject of who their respective distributors in a given area will be?
>
> Mr. Bronfman: If you are restricting this question to the House of Seagram companies, the answer is yes. (Tr. III: 964.)[7]

[7]The post verdict opinion of the court filed July 24, 1967 omits this testimony and substitutes three asterisks. (R. 325.)

In spite of this testimony, the court took it upon itself to rule that any consultation and agreement violated "normal procedure" and subjected Seagram to liability. No policy of the antitrust laws requires undeviating adherence to a practice of intracorporate competition even when the corporation's officers determine otherwise. The ruling was not only erroneous but also inappropriate (since the court was not sitting as trier of fact).

Had Seagram concealed the fact that its sales companies were no more than divisions of a single company, so that outsiders were misled, a tenuous claim of estoppel might be urged. But there was no deception here. Each of the three contracts with plaintiff and the divisions is identical except for the name of the division. (Exs. S-10, 11, 12.) Each was identified as divisions of Seagram. All billing to plaintiff was by and in the name of Seagram and all payments were made to Seagram. (Tr. V: 1834; VII: 2642; Ex. M-41.) Plaintiffs clearly knew that it was dealing with three divisions of one entity, not three separate and independent businesses.

The lower court stressed the fact that the divisions had previously been wholly owned subsidiaries of Joseph E. Seagram & Sons, Inc. and that in *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., et al.*, 340 U.S. 211 (1951), it was held that the subsidiaries were capable of conspiring among themselves. It stated:

> There is nothing wrong with reorganizing to comply with court rulings. However, to avoid the

> judicial proscription, the reorganization must be more than a shuffling of papers. . . . Private parties cannot evade the applicable law merely by changing the label attached to a particular business entity. (R. 324, 325.)

There is nothing in the record to sustain the court's characterization of Seagram's reorganization as a "shuffling of papers" or a mere change of "label." The consolidation entailed substantial changes in the corporate structure and resulted in the sacrifice of certain advantages by Seagram. Formerly each subsidiary was a self-contained unit. Each had its own assets and its own payroll. Each had its own accounting department and each did its own billing. Each had limited liability. After the consolidation, anyone (including plaintiff) with a cause of action against any division could look to the entire assets of The House of Seagram, Inc. Moreover, consolidation resulted in the loss to Seagram of all the tax advantages available to multiple corporations. See, e.g. IRC §§11(c), 531. It was no sham transaction.

The law provides alternative methods of doing business, each having advantages and disadvantages. If Seagram decided that the result reached in *Kiefer-Stewart* was an unrealistic reflection of the substance of its operations, it was entitled to reorganize its corporate structure. The court's gratuitous conclusion that the reorganization was a mere "shuffling of papers" was wholly unwarranted from the record even had the court been the trier of fact. The court expressed concern that a contrary conclusion would

open the door to avoidance of the impact of the Sherman Act. It stated:

> To hold otherwise would give businessmen the power to avoid the proscriptions of the antitrust laws by the fortuitous employment of alert legal counsel. (R. 322.)

This represents a back-door approach to enforcement of antitrust policy. If a single corporation possesses undue power, Section 2 provides the remedy. If the corporation is not in violation of Section 2, it should be free to have its business handled by different groups of employees without fear of running afoul of Section 1. Indeed, there is no validity to a doctrine that can be easily circumvented by having all the corporation's products handled by the same salesmen. The result would simply burden the corporation with a less efficient distribution with no benefit to the public.

The decision below is contrary to precedent, flies in the face of settled concepts of corporate law and the law of conspiracy, and serves no useful economic purpose. It furthers no policy of the antitrust laws and should be flatly repudiated.

2. There was no evidence of an agreement between Seagram and Barton

Since the three Seagram divisions are legally incapable of committing a Section 1 violation, proof of an agreement between Seagram and Barton was necessary to sustain plaintiff's boycott allegation. *Standard Oil Co. of California v. Moore,* 251 F.2d 188, 211,

n. 26 (9th Cir. 1957), cert. denied 356 U.S. 975 (1958); *Ace Beer Distributors, Inc. v. Kohn, Inc., supra.*

Plaintiff admitted there would be no proof of any express agreement between Seagram and Barton. (Tr. I: 22.) It argued instead that McKesson acted as an intermediary between them and that through McKesson they reached a tacit agreement to leave Hawaiian Oke and go with Portside. This argument is sheer speculation out of whole cloth. It is not supported by the evidence.

a. Conflicts in the Evidence

Although there were several evidentiary conflicts, nothing produced by plaintiff supports the inference of an agreement between Seagram and Barton.

Barton asserted that its decision to go with Portside was not made until after Friedman came to Hawaii in early July and examined the respective facilities of Hawaiian Oke and McKesson. Plaintiff, however, introduced evidence purporting to show that this decision was made earlier. (Exs. P-71, 72, 88.) This, if true, in no way establishes any link between Seagram and Barton.

Although Barton did not dispute that it knew of Seagram's decision before making its own, Seagram did not know of Barton's decision to go wth Portside until after all three of its divisions had made their commitments. Nonetheless, Ted Wong testified that Ed Kaufman of Four Roses telephoned him on June 28 and informed him not only that Four Roses was going

with Portside, but also that Barton had made a similar decision. (Tr. II: 467-469.)

If Wong's testimony is accepted as true, it establishes nothing more than mere knowledge by Seagram of Barton's decision or intended decision. It does not even establish conscious parallelism by Seagram. There is nothing to support an inference that this information was obtained before Four Roses had made its commitment to McKesson. In any event, it falls far short of establishing any agreement or mutual understanding between Seagram and Barton.

b. Conscious Parallelism in the Factual Context of This Case Is Insufficient Evidence of a Seagram-Barton Agreement

While conscious parallelism may be circumstantial evidence of a conspiracy, it does not of itself establish a Sherman Act violation. The Supreme Court has stated:

> (T)his Court has never held that proof of parallel business behavior conclusively establishes agreement or, phrased differently, that such behavior itself constitutes a Sherman Act offense. Circumstantial evidence of consciously parallel behavior may have made heavy inroads into the traditional judicial attitude toward conspiracy but 'conscious parallelism' has not yet read conspiracy out of the Sherman Act entirely. *(Theatre Enterprises, Inc. v. Paramount Film Distributing Co.,* 346 U.S. 537, 541 (1954).)

As the Third Circuit has pointed out,

> . . . (T)he probative value of (conscious parallelism) varies with the kind of parallelism and the factual setting where it is found. *(Delaware*

> *Valley Marine Supply Co. v. American Tobacco Co.,* 297 F.2d 199, 203 (3d Cir. 1961), cert. denied 369 U.S. 839.)

Thus, sealed bids for 6,000 barrels of cement, for example, from eleven firms, identical to the fraction of a cent could hardly be coincidence. Cf., *FTC v. Cement Institute,* 333 U.S. 683 (1948). But a negative response by three cigarette companies to a request to do business with a new company setting up a ship chandlery operation was entitled to little weight, because the situation "was not of a sort which allowed much scope of action to the participants"; the only two possible answers to the request were "yes" or "no." *Delaware Valley Marine Supply Co. v. American Tobacco Co., supra* at 205.

The situation here is of the *Delaware Valley* rather than the *Cement Institute* type. Seagram and Barton were offered the opportunity to go with Portside. They could accept or refuse. They both accepted. More than this was needed to establish a conspiracy.

In *Delaware Valley,* the court ruled that there was evidence for the jury to find that each corporation was aware of the action taken by the others. It nonetheless affirmed a directed verdict on the ground that there was insufficient evidence from which a jury could rationally infer a conspiracy.

This Court reached the same result in *Independent Iron Works, Inc. v. United States Steel Corp.,* 322 F.2d 656 (9th Cir. 1963), cert. denied 375 U.S. 922, in affirming a directed verdict, holding:

> The mere fact that two or more of the defendants dealt with the plaintiff in a substantially similar manner does not support an inference of conspiracy, even though each knew that the business behavior of another or the others was similar to its own. . . . (p. 661.)

Here, no meeting was ever held between any representative of Seagram and Barton. There was no conversation, writing or even a telephone call between them. There was no conversation or communication between McKesson and either Seagram or Barton by which McKesson acted as a "go-between." Nor do the circumstances of their decisions to change rationally lead one to conclude that they must have agreed with each other beforehand. A conclusion that Seagram and Barton reached any agreement, express or tacit, is pure speculation. As this Court previously stated:

> Mere speculation must not be allowed to take the place of probative facts. (*Safeway Stores v. Fannan,* 308 F.2d 94, 97 (9th Cir. 1962).)

This rule was recently applied in directing a verdict for defendants in a case alleging a group boycott by manufacturers and retailers to prevent a discount house from obtaining appliances. *United Shoppers Exclusive v. Broadway-Hale Stores, Inc.,* 1966 Trade Cases ¶71,727 (D.C. Cal. 1965).

c. Inapplicability of the Interstate Circuit Doctrine

In the absence of proof of an agreement between Seagram and Barton, plaintiff relied on *Interstate Circuit, Inc. v. United States,* 306 U.S. 208 (1939).

There the court held that participation in a plan, knowing that if carried out it would result in a restraint of trade, was sufficient to establish an unlawful conspiracy if the restraint was unreasonable. (306 U.S. 226-227, 230-232.) In holding the restraint unreasonable, it condemned the plan as "harsh and arbitrary" (p. 230) and "the effect was a drastic suppression of competition and an oppressive price maintenance." (p. 231.)

Whether a given case constitutes conscious parallelism within the rationale of *Theatre Enterprises* or participation in a plan within the meaning of *Interstate Circuit* depends on the presence or absence of two factors. To fall within *Interstate Circuit* there must be (1) a plan whose success depends on the cooperation of all participants, or, in other words, the element of interdependence; and (2) knowledge of such interdependence by the participants or, as stated by some courts, "a consciousness of commitment."

> *Interstate Circuit, Inc. v. United States, supra* at 226, 227;
>
> *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp., supra* at 540-541;
>
> *Klein v. American Luggage Works, Inc.*, 323 F.2d 787, 791 (3d Cir. 1963);
>
> *United States v. Standard Oil Co.*, 316 F.2d 884, 890 (7th Cir. 1963).

Neither factor was present here.

First, there was no evidence that the success of the plan for establishing Portside depended on the par-

ticipation of Barton. The evidence was clear that Portside could not survive with Calvert alone and that it needed a Class B line. (Tr. II: 401.) Portside had acquired a Class B line, Kessler, when it acquired the Four Roses distributorship. (Tr. III: 1301; IV: 1527.) It also acquired a further Class B line, Mattingly & Moore, when it acquired the Frankfort distributorship. (Tr. IV: 1525; VI: 2323, 2325.) Nothing in the record supports the inference that McKesson needed Barton to make Portside viable.

Moreover, there were other potential lines, and McKesson had not exhausted those possibilities when Barton's decision was made. (Tr. II: 352, 401-402, 407-408; IV: 1544-1546; VI: 2437-2438.) Thus, even if the Seagram lines were not enough, nothing supports the conclusion that the move would have failed had Barton not participated. McKesson itself had other lines that it could shift to Portside if it chose. (Tr. II: 352, 401-402.)

Second, there is no evidence that either Seagram or Barton had any knowledge that the formation of Portside depended on their joint participation. Everyone knew that a distributor needs more than one line, but the record is barren of evidence that either Seagram or Barton had any reason to believe that the Barton line was essential or that other lines were not available.

There is no evidence of any commitment between Seagram and Barton not to deal with Hawaiian Oke. They were free either to establish a dual distributorship (Seagram did with Kessler earlier, Tr. IV: 1458,

1460) or to give any product back to Hawaiian Oke, or anyone else. All the Seagram contracts permitted it to appoint other distributors if it chose. (Exs. S-10, 11, 12; see para. 32.) There was no evidence that Seagram's arrangement with McKesson was any different. Barton had no contract with plaintiff. (Tr. II: 503, 571.) There was no evidence of any contract between Barton and McKesson.

In short, the necessary elements of the *Interstate Circuit* doctrine were not met. Lacking such proof, along with admitted absence of any agreement between Seagram and Barton, the complaint should have been dismissed.

B. An Agreement by Two or More Suppliers to Establish an Exclusive Distributor for Their Products Is Not a Group Boycott

Although there is no evidence to support it, we assume, *arguendo,* that an agreement was proved, and will demonstrate that such an agreement is not a per se violation or, to use the label, a "group boycott."[8]

1. The per se rule

The Sherman Act prohibits only those combinations or contracts constituting an unreasonable restraint of trade. *Standard Oil v. United States,* 221 U.S. 1 (1910). Certain types of agreements by their very nature constitute an unreasonable restraint and cannot be justified under any circumstances. *Id.,* at 58, 65.

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[8]The Seagram divisions will be treated as one entity for present purposes.

The category of per se antitrust violations consists of:

> . . . agreements or practices which because of their *pernicious effect on competition* and *lack of any redeeming virtue* are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. (Emphasis supplied.) *Northern Pacific R. Co. v. United States,* 356 U.S. 1 (1958).

Among these are group boycotts, or concerted refusals to deal. *Klor's Inc. v. Broadway-Hale Stores, Inc.,* 359 U.S. 127 (1959); *United States v. General Motors Corp.,* 384 U.S. 127 (1966).

2. Characteristics of Group Boycotts

Broadly, a group boycott is a horizontal agreement (i.e., one between persons on the same level of competition) to refuse to deal with others. *White Motor Co. v. United States,* 372 U.S. 253, 263 (1963). However, not every horizontal agreement that results in non-dealing with others constitutes a group boycott. Only those possessing certain proscribed characteristics have been condemned. The Supreme Court described group boycotts as:

> . . . naked restraints of trade with no purpose except the stifling of competition. *(Ibid.)*

a. Discriminatory Boycotts

The majority of agreements struck down as group boycotts have been discriminatory in concept and operation. They single out a particular individual or class with whom the group will *not* deal, leaving the group free to deal with any others they choose. This

kind of agreement is the converse of an exclusive distributorship, which singles out a particular business with whom the group will deal, to the indiscriminate exclusion of all others. An agreement whereby competitors single out certain individuals or classes for non-dealing can have one of two purposes—to coerce others to comply with some policy of the group or to exclude others from the market.

Klor's and *General Motors* exemplify discriminatory boycotts used to exclude. In *Klor's,* a small retailer in competition with one of the defendants was singled out for non-dealing in an attempt to exclude him from the market. In *General Motors,* discount dealers as a class were singled out. There, exclusion was not the end in itself, but rather the means employed to maintain retail price levels.

Eastern States Lumber Association v. United States, 234 U.S. 600 (1914) exemplifies a boycott used to coerce. The purpose of the boycott was to compel compliance with the plan for horizontal division of the market. In *Binderup v. Pathe Exchange,* 263 U.S. 291 (1923), a discriminatory boycott was used to coerce adherence to an illegal tying agreement.

Discriminatory boycotts plainly fall within the rationale of the per se rule. Any combination of competitors formed to coerce or exclude others from the market is antithetical to competition. No business can have any legitimate competitive interest in who its competitor does not deal with.[9] Hence such agree-

[9]This does not apply to industry-wide regulation. This exception to the boycott rule is discussed below.

ments are condemned without regard to their economic consequences or the business reasons for adoption.

b. Indiscriminate Exclusionary Boycotts

Those agreements held to constitute boycotts that have not singled out a particular individual or class for non-dealing have been exclusionary in nature. That is, they seek to close the market to all but those within the favored group. *Radiant Burners, Inc. v. Peoples Gas Co.*, 364 U.S. 656 (1961) is an example. There a group of utilities refused to supply gas to any burners they had not approved, thereby excluding from the market any entrant who sought to compete with certain favored equipment manufacturers.

This type of boycott falls squarely within the rationale of the per se rule. It is nothing more than a device to achieve or maintain a horizontal division of the market, a practice long condemned under the antitrust laws. *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211 (1899).

3. Per se rule is inapplicable

The courts recognize that the per se rule does not apply to conduct resulting in non-dealing where there is a "justification derived from the policy of another statute or otherwise." *Silver v. New York Stock Exchange*, 373 U.S. 341, 348-49 (1963).

In *Deesen v. Professional Golfers' Association*, 358 F.2d 165 (9th Cir. 1966), cert. denied 385 U.S. 846, a professional golfer attacked as a boycott the refusal

of the PGA to permit him to participate in its tournaments. This Court found that the PGA requirements served a legitimate need and that since plaintiff did not meet those requirements, he had not been subjected to discrimination.

In *Cowen v. New York Stock Exchange*, 371 F.2d 661 (2d Cir. 1967), the court refused to apply the per se rule to disciplinary action against a stockbroker by the Stock Exchange.

In *Molinas v. National Basketball Association*, 190 F.Supp. 241 (S.D. N.Y. 1961), the court reviewed the rule whereby the owners of several professional basketball teams agreed to refuse to deal with players who bet on games. It found the rule reasonable and dismissed the complaint.

In *United States v. Insurance Board of Cleveland*, 144 F.Supp. 684 (N.D. Ohio 1956), 188 F.Supp. 949 (N.D. Ohio 1960), the government condemned a rule of a trade association excluding from membership any agent representing mutual, as opposed to stock, companies. The court refused to apply the per se rule. It recognized that *Klor's* and the other boycott cases concerned inherently anti-competitive plans where the refusal to deal was simply a naked restraint of trade with no redeeming virtue.

These cases make clear that the per se rule is not to be applied mechanically to strike down joint action that serves a legitimate purpose.

The cases cited above more nearly resemble group boycotts than does the "agreement" claimed here. In

each, identification of the class with which there were to be no dealings was critical. *Deesen* and *Molinas* involved total exclusion from the market. *Molinas* also involved coercion. None of this is present here.

Hawaiian Oke was not singled out for non-dealing. There was no more a refusal to deal with Hawaiian Oke than there was to deal with other distributors. Nor was there any evidence of an attempt to exclude it from the liquor market. There is no evidence that no other competing products were available as replacements. In fact, there were numerous lines being distributed in Hawaii (Tr. IV: 1544-1546; VI: 2367-2368), and plaintiff did not contact even a single supplier to secure replacements.[10]

Despite absence of discrimination, coercion or attempt to exclude it from the market, plaintiff maintained that there was nonetheless a "boycott" since there was an agreement between competitors which resulted in non-dealing with Hawaiian Oke.

If this is the law, the practical effect would be the stifling of legitimate joint ventures and other business projects requiring the pooling of resources. For example:

If A and B, theatrical producers, agree to pool their resources for a production that neither could finance alone and they agree to purchase costumes from C,

[10]Ted Wong admitted that the only efforts to secure replacements were telephone calls to two friends in California. (Tr. I: 289-298.) One told him of the interest of one particular supplier, but plaintiff did not follow up. (Tr. I: 299-303.)

props from D and fixtures from E, this necessarily entails an agreement not to deal with F, G, H or any other possible supplier. Under plaintiff's theory this would be illegal per se.

The following would be similarly condemned:

A and B are liquor suppliers. Two large companies, C and D, are the only liquor distributors in City X. A deals with C, and B deals with D. Both A and B are dissatisfied. E, a newcomer trying to break into the market, informs several suppliers, including A and B, that he will set up a business with a commitment from two of them. A and B discuss E's potential and decide to give him their business. C and D continue in business despite the change of distributors by A and B.

Neither of these examples represents conduct so inconsistent with the competitive system and lacking in redeeming virtue as to be condemned out of hand as an unreasonable restraint, yet both involved horizontal agreements that result in non-dealing with others. The examples could be multiplied.

It is clear that an agreement between A and B to deal with D that results in non-dealing with C and the others does not suffer from the vices inherent in a simple agreement not to deal with C. Where there is no discrimination, no coercion, no attempt to exclude from the market, and no element of price fixing, illegal tying, or any similar arrangement, it is pointless to condemn such an agreement as illegal per se.

The agreement that plaintiff alleges here can serve a useful and legitimate purpose and is not a "naked

restraint of trade with no purpose except the stifling of competition" (Cf. *White Motor Co. v. United States, supra*). If the first distributor was dishonest or incompetent, the agreement would foster, not restrict, trade and thus benefit the public.

Plaintiff contended that the vice here was interdependence of Barton and Seagram. It claimed that the new Portside house could not have been formed without a mutual commitment from each and that McKesson would never have made the investment unless it knew the Portside house would be viable. (Tr. III: 871; VI: 2595, 2667-2669.) If this is so, it demonstrates the fallacy of plaintiff's position. While strenuously arguing that the new house could not have been formed without commitments by two or more suppliers, plaintiff contends that such commitments automatically constitute a violation. If this type of arrangement is so anticompetitive and devoid of merit that one does not even have to examine its effect on the market, then it applies with as much force to a small company trying to break into the market as it does to an established distributor like McKesson. Such an arrangement may in fact be the only practicable means available for a small company to enter the market.

The economics of the liquor industry are such that liquor distributors must have a "well-rounded" set of lines. They must supply their retailer customers with name brand, high-profit Class A lines and lesser-known, lower profit Class B lines; the addition of a "cheap"

Class C line is helpful. (Tr. II: 401-402, 671, 674; VII: 2667-2669.)[11] If a newcomer attempts to break into the market, he must be assured that he has enough lines to make it worthwhile. Similarly, before an established supplier can be expected to go with a new concern, it has a legitimate interest in the nature and scope of the operation and in the question of how its own line will fit into the total business of the distributor.

For the courts to abandon the rule of reason and apply the per se doctrine mechanically to all horizontal agreements resulting in non-dealing with others would inevitably freeze the liquor distributing industry in status quo. It would prevent the entry of competitors—a result directly contrary to the purposes of the antitrust laws. Cf. *Brown Shoe Co. v. United States,* 370 U.S. 294 (1962); *United States v. Jerrold Electronics Corp.,* 187 F.Supp. 545, 560-568 (E.D. Pa. 1960), aff'd 365 U.S. 567 (1961).

The court below adopted a rule that would reduce the place of the independent by accelerating the trend toward vertical integration of distribution. If a supplier, dissatisfied with his existing distributor, knows he cannot participate in a plan to start another, he might abandon franchising altogether and simply integrate vertically.

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[11]Far from denying this, plaintiff took pains to emphasize that this was so. (Tr. VI: 2595; VII: 2667-2669.)

A rule that forbids businessmen from making a joint effort to extricate themselves from an unsatisfactory situation and leaves them with the choice of remaining where they are or integrating vertically makes little sense in terms of antitrust policy. The group boycott rule was never intended to apply to non-dealing situations that arose out of otherwise lawful projects requiring a joint effort or commitment.

Plaintiff relied solely on its per se theory and offered no evidence of an anti-competitive purpose or of the effect of the "agreement" on the relevant market. It failed to establish a per se violation, hence the complaint should have been dismissed.

II. THE COURT ERRED IN THE ADMISSION AND REJECTION OF EVIDENCE ON LIABILITY

A. Admission of Testimony As to the Purpose of Seagram's and Barton's Change of Distributors

Plaintiff attempted to prove that Seagram and Barton changed distributors for other than legitimate business reasons. However, the only "evidence" relating to any possible anti-competitive purpose was testimony by Ted Wong as to a conversation he had with Sheldon Friedman of Barton. Wong was asked if Friedman gave him any reason for the cancellation of the Barton distributorship, and testified:

> I asked him why this arrangement was being ended and he told me he didn't know; probably it would be a deal that McKesson would get Barton distribution in the West Coast . . . and in turn they would receive distribution here in Hawaii. And I asked him why would Seagram be involved. And he stated, well, maybe they have a deal some place, maybe in Europe. (Tr. 167-168.)

The court overruled defendants' objections of hearsay and speculation and admitted the testimony to show Friedman's state of mind. (Tr. 168-171, 558, 563.) It did so despite Wong's admission that Friedman's alleged statement had been a mere "guess" without any basis in fact. (Tr. 556-565.)

The fact that Friedman "guessed" that there might be a "deal" somewhere could not possibly aid the jury in reaching a logical conclusion as to Barton's reason for changing once Friedman stated that he did not know what the reason for the change was. The only possible relevance of Friedman's "guess" would be to prove that there was in fact such a "deal." But then his statement would be offered for its testimonial rather than circumstantial value. That would be inadmissible as hearsay.

Dantzler v. Dictograph Products, Inc., 309 F.2d 326, 329, 330 (4th Cir. 1962) cert. denied 372 U.S. 976;

Subin v. Goldsmith, 224 F.2d 753, (2d Cir. 1955) cert. denied 350 U.S. 883.

It would also be inadmissible as speculation. The rule is set forth in 7 *Wigmore on Evidence* (3d ed.) § 1917:

> The witness must speak as a knower, not merely a guesser. . . . (A) witness cannot be heard, so far as he means that he did not see the transaction in question but believes so on rumor alone or has otherwise reached by supposition his conclusion. (p. 2.)

Dantzler v. Dictograph Products, Inc., supra at 329.

Accord:

Barnett v. Aetna Life Ins. Co., 139 F.2d 483 (3d Cir. 1943), cert. denied 321 U.S. 781 (1944);

Farris v. Interstate Circuit, Inc., 116 F.2d 409 (5th Cir. 1941);

Northern Trust Co. v. C.I.R., 116 F.2d 96 (7th Cir. 1940).

See also:

2 *Wigmore on Evidence* (3d ed.) §§ 650, 656, 658;

96 C.J.S. *Witnesses* § 52 (1957).

This testimony was the only evidence in the case suggesting any possible improper motive for the change of distributors. Its admission in flagrant disregard of elementary rules of evidence was highly prejudicial to all defendants and requires a reversal.

B. Evidence Comparing Plaintiff's Performance Before the Change With Portside Was Error

The court admitted over objection evidence comparing plaintiff's sales of Seagram and Barton products before the change of distributors with Portside's sales after the change. (Exs. P. 17A, P-17B, P-19, P-20, P-22, P-23, P-24, P-25, P-28, P-29, P-106, P-107, P-108, P-109, P-111, P-112, P-113, P-114, P-115; Tr. II: 813-815, 821-824; VI: 2405.) By showing that in certain instances plaintiff's sales exceeded Portside's, plaintiff attempted to prove that Seagram and Barton could not reasonably have been dissatisfied with plaintiff and that their decisions must have been based on factors other than legitimate business reasons.

Portside's sales performance was totally irrelevant. Such evidence could only serve to prejudice the jury. There was nothing to suggest that in June and July of 1965, either Barton or Seagram had the slightest reason to suspect that Portside would not do a good job. Plaintiff's evidence represented nothing more than an attempt to second-guess defendants. It was irrelevant and prejudicial.

Independent Iron Works, Inc. v. United States Steel Corp., supra;

Standard Oil Co. of California v. Moore, supra;

Volasco Products Co. v. Lloyd A. Fry Roofing Co., 308 F.2d 383 (6th Cir. 1962), cert. denied 372 U.S. 907 (1963);

Flintkote Co. v. Lysfjord, 246 F.2d 368 (9th Cir. 1957), cert. denied 355 U.S. 835 (1957).

After the court let this evidence in, it compounded the error by excluding evidence that Barton was dissatisfied with Portside after the change and had negotiated with another distributor, Spengler & Sons. A letter evidencing the negotiation, Exhibit B-67, was ruled inadmissible as cumulative. (Tr. III: 863-867.)

III. THE COURT ERRED IN GIVING AND REFUSING INSTRUCTIONS ON LIABILITY

A. Participation by Two or More Suppliers in a Plan to Establish an Exclusive Distributor Is Not a Group Boycott (Error No. 5, App., p. ix)

As shown above, an agreement between Seagram and Barton to use Portside would not be a per se violation, and the lack of proof of an unreasonable restraint requires reversal. Even if plaintiff had introduced evidence of an unreasonable restraint, a reversal would be required because the jury was not required to find any unreasonableness before finding liability.

The court charged the jury that if defendants participated in a plan to establish the new McKesson house knowing the result would be non-dealing with plaintiff, this was a per se violation.[12] Over objection (Tr. VIII: 3140-3151), it refused to distinguish between non-discriminatory non-dealing with plaintiff

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[12]The court's Instruction No. 6 is set forth in full in Error No. 5. It should be read together with the court's instructions on a "common plan". (Tr. VIII: 3203, 3212.)

that was simply a by-product of an exclusive dealership with McKesson and an actual agreement or plan to refuse to deal with Hawaiian Oke.

It charged that if McKesson "by solicitation of lines or otherwise" formed a "conspiracy" with Seagram and Barton "to terminate Hawaiian Oke . . . and to establish Portside," this was a per se violation of the antitrust laws by all defendants. (Tr. VIII: 3207-3208.) It stated that participation in a plan knowing the necessary consequence of which is to restrain trade (it did not say "unreasonably") was an "unlawful conspiracy" (Tr. 3212) and that a refusal to deal arising out of a "conspiracy" was an unreasonable restraint of trade (Tr. 3209). It told the jury that if there were such a plan, then the business reasons of the "conspiring parties" were not material. (Tr. VIII: 3208.)

These instructions were tantamount to a directed verdict for plaintiff. The jury did not have to find an intent to coerce others from dealing with Hawaiian Oke or exclude it from the market. Nor was it required to find that the purpose or effect of the plan to establish Portside was to single out Hawaiian Oke for discriminatory treatment. There was no need to find that the success of the plan was dependent on the participation of both Seagram and Barton. Nor was there any requirement of a finding of consciousness of commitment to a common plan between Seagram and Barton. (See Point 1A2c, *supra.*)

Under the court's instructions, the jury had to return a verdict for plaintiff even if it found that Sea-

gram had legitimate business reasons for requiring that Calvert not be handled by the same salesmen who sold Seagram 7 Crown, that the only way McKesson could arrange this was by setting up a separate house, that the only way it could hope to obtain other lines was to explain the nature of its proposed operation to the suppliers, and that Barton and Seagram made the change solely to improve the distribution of their products.

These facts do not per se constitute an unreasonable restraint of trade. If McKesson was prohibited from advising the solicited suppliers of the nature and scope of its new house, its efforts to secure new business would be doomed. The same would be true if McKesson were a newcomer trying to break into the market. A supplier cannot reasonably be expected to go in blindfolded.[13] To say that McKesson cannot inform suppliers of the products it proposes to include is to say that suppliers may not intelligently decide whether their products will receive the attention they deserve and whether the proposed new house seems viable.

A distributor must have a high profit Class A line to succeed, and Barton was a Class B line. (Tr. II: 401-402, 671, 674, VII: 2667-2669.) It was obviously reasonable for Barton to wish to know what primary lines the new house would carry. If in fact the Sea-

[13]The courts have recognized that manufacturers' decisions regarding the distributors of their products "are not made in a vacuum." *Schwing Motor Co. v. Hudson Sales Corp.*, 138 F.Supp. 899, 906 (D. Md. 1956), aff'd 239 F.2d 176 (4th Cir. 1956).

gram lines had already been committed to the new house or had indicated probable commitment, Barton would be entitled to take this into account in assessing its own position. If the jury found that Barton honestly believed that Hawaiian Oke could not do a good job for it without Class A lines, it must certainly be entitled to change.

The court's instructions produce the absurd result that Barton may go with any other distributor it desires but it cannot go to Portside. The jury was told to do so would be to participate in the plan, and this would be, *ipso facto* an unreasonable restraint of trade.

Even if the instructions had required findings of interdependence (i.e., that the success of the plan depended on the participation of both Seagram and Barton) and knowledge of Seagram and Barton of such interdependence, they would still have been erroneous.[14] If, as plaintiff argued, a new liquor distributing house by its very nature required more than one line, application of the per se rule to this situation would effectively prohibit the formation of new houses. Where the non-dealing is incidental to the establishment of a joint exclusive distributor, where the plaintiff is not treated differently from all other distributors, where there is no attempt to coerce or to exclude others from the market, and where the establishment of the new distributor is for legitimate business reasons and not part of a plan to monopolize,

[14] The instructions contained no such requirement.

fix prices or engage in any other anticompetitive conduct, the rule of reason must be applied.

B. The Seagram Subdivisions Are Incapable of Conspiring Among Themselves (Error No. 6, App. p. xiii)

The court told the jury that the Seagram divisions were capable of conspiring among themselves. (Tr. VIII: 3204-3205.) It did not instruct the jury that they were to treat the divisions as separate only if they found the reorganization of Seagram was a sham or if they found that an agreement among the officers violated an established company policy. The court's instruction was erroneous for the reasons discussed in Point IA-1, *supra*.

C. A Parent Corporation May Lawfully Instruct Its Wholly Owned Subsidiary to Change Distributors

The court charged the jury that if Joseph E. Seagram & Sons, Inc. induced any of the Seagram divisions to initiate or join a "conspiracy" (i.e., a plan) to terminate Hawaiian Oke as distributor and establish Portside, this was an antitrust violation. (Tr. VIII: 3208.) This instruction is erroneous and unprecedented. It enabled the jury to impose liability if it found that Joseph E. Seagram & Sons, Inc. determined that its interests would be best served by a change of distributors by all three divisions and then urged the divisions to make the change.

If Barton knew of the alleged action of Joseph E. Seagram & Sons, Inc. in inducing the divisions to change and then accepted McKesson's solicitation, it too was liable under the court's instructions, since

the jury could have found that it thereby knowingly joined an existing conspiracy. (Tr. VIII: 3211-3212.)

The jury could have thus imposed liability even if it found no agreement or mutual understanding between any of the Seagram divisions or between Seagram and Barton. Such a state of facts is not within any decided cases on group boycott. There is no basis in precedent or policy for ruling that it constitutes a per se Sherman Act violation.

D. The Court Erred in Giving and Refusing Instructions on Conscious Parallelism

The court instructed the jury that parallel behavior alone was sufficient to establish a conspiracy. It ruled that while such behavior does not necessarily establish an agreement, ". . . parallel behavior is admissible circumstantial evidence from which you may infer agreement. . . ." (Tr. VIII: 3203.)

The court expressly refused to give the following, which was offered as proposed instruction B-9:

> The fact alone that two or more defendants dealt with plaintiff in a substantially similar manner (at or about the same time) does not support an inference of conspiracy even though each defendant may have known that the business behavior of the other was similar to its own. Similarity of operation does not prove a conspiracy unless there are circumstances which logically suggest joint agreement as distinguished from individual action.

The court also refused to give proposed instructions S-5 and S-11. (See App., p. xviii.) The court's

instruction does not correctly state the law, whereas proposed instructions B-9, S-5 and S-11 do.

Theatre Enterprises, Inc. v. Paramount Film Distributing Co., supra;

Independent Iron Works, Inc. v. United States Steel Corp., supra;

Delaware Valley Marine Supply Co. v. American Tobacco Co., supra.

The court conceded that proposed instruction B-9 was a correct statement of the *Independent Iron Works* decision but it declined to follow it on the ground that it was wrong and that the statement was only dictum. (Tr. VIII: 3005.) The jury was thus permitted to infer a conspiracy from parallel behavior alone. This was error.

Although the foregoing arguments are, we submit, sufficient to dispose of this appeal, we will turn to some of the numerous errors on damages.

IV. THE COURT ERRED IN ADMISSION OF EVIDENCE ON DAMAGES

On the admission and exclusion of evidence of damages, the court virtually abandoned the rules of evidence. It repeatedly admitted prejudicial exhibits and testimony that fell far short of recognized standards of proof.

The fundamental error that led to this disregard of the rules of evidence was the court's misconception of the purpose and scope of the rule permitting re-

covery where damage can only be estimated by the jury.

See:

Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555 (1931);

Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251 (1946).

That rule was designed to preclude thwarting recovery where the nature of the violation made it impossible for the plaintiff to prove damage with mathematical certainty. It was never intended to abrogate the rules of evidence. As the Supreme Court said in *Bigelow:*

> . . . (T)he jury may not render a verdict based on speculation or guesswork. But the jury may make a just and reasonable estimate of the damage based on *relevant data,* and render its verdict accordingly. (p. 264, emphasis supplied.)

The trial court construed *Story Parchment* and *Bigelow* as creating a license for admission of anything proffered by the plaintiff.

A. Admission of Exhibits to Prove That Plaintiff Had a Going Concern Value

Plaintiff made no claim for recovery of lost or prospective profits. (Tr. VIII: 2822, 3132.)[15] Instead it limited its claim to the market value of its business

[15]This was not inadvertent (see, e.g. Tr. VIII: 3122) but undoubtedly to avoid taxation at ordinary income rates. See *Raytheon Production Corp. v. Commissioner of Int. Rev.,* 144 F.2d 110 (1st Cir. 1944, cert. denied 323 U.S. 779 (1944); *Durkee v. Commissioner of Int. Rev.,* 162 F.2d 184 (6th Cir. 1947).

allegedly destroyed and alleged out-of-pocket losses. (Tr. I: 39; VIII: 2960, 2964.) First, the claim for lost market value.

1. Mathematical representations of counsel's argument were admitted as evidence

To prove market value in excess of that received on liquidation, plaintiff introduced charts prepared by Grant Caldwell, a CPA, purporting to show that plaintiff's business had a high profit potential and "goodwill" or "going concern" value before it ceased operating. (Exs. P-2, 3, 4, 5.)[16]

They were not offered as expert opinion. Caldwell disclaimed knowledge of how to determine the value of a business and did not vouch for the relevance of the charts. (Tr. III: 1155-56.)

When defendants asked him whether the projections represented sound accounting principles, plaintiff objected:

> Mr. Blecher: . . . the witness has made it clear that he has done nothing but a mathematical computation of certain things which I developed as a matter of legal theory as a basis for the claim of damages. . . . they are trying to cross-examine as though he is vouching for these and that he is an expert. . . .
>
> Mr. Anthony: That is argument, then.

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[16]Ex. P-2, a profit projection for 1965, used the first six months as a base. Ex. P-3 used the 1965 profit figure obtained in Ex. P-2, for projecting profits for 1966-1969. Ex. P-5 capitalized the average projected profit obtained for the 5-year period 1965-1969 to determine the market value in 1965. Ex. P-4 used figures of defendant McKesson to project plaintiff's profits.

> Mr. Anderson: . . . Mr. Blecher said that this man is not an expert. From what Mr. Blecher is saying, as I understand, this is merely a dummy Mr. Blecher. . . .
>
> Mr. Blecher: That is basically correct.
>
> (Tr. III: 1141.)

When Mr. Caldwell was asked if he would have relied on similar projections if he was representing someone interested in buying Hawaiian Oke, plaintiff again objected:

> If Mr. Anderson would like to establish Mr. Caldwell as an expert in acquisitions, he should proceed and do so as part of his own case. (Tr. III: 1152.)

The objection was sustained, as was a similar objection to a question on the need to examine the corporation's books. (Tr. III: 1154-55.)[17]

> Mr. Blecher: I object on the grounds that the witness has not been established by me . . . as an expert in this area. (Tr. III: 1154.)

Under no principle of law were these exhibits admissible in evidence. Theories of counsel are not evidence; nor are they a substitute for evidence.

Carroll v. Magnolia Petroleum Co., 223 F.2d 657, 665 (5th Cir. 1955);

Watn. v. Pennsylvania Railroad Co., 255 F.2d 854, 858 (3d Cir. 1958);

People v. Love, 56 Cal.2d 788, 366 P.2d 33 (1961);

6 *Wigmore on Evidence* (3d ed) §1806.

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[17]Caldwell had not examined plaintiff's books. (Tr. 1154.)

As representations of counsel's damage theory, they were devoid of probative value. Although the witness through whom they were offered expressed his agreement with certain aspects of them, he did not purport to be an expert in business valuation. His only function was as a "dummy" to lend an air of authority to counsel's damage theory.

To have any relevance as evidence, the charts would have to represent a witness's opinion of 1965 market value; and the witness would have to qualify as an expert so that his opinion would have probative value. II *Wigmore on Evidence* (3d ed.) §§560, 1917.

Submitting the charts to the jury through a sworn witness (whether or not an expert) cloaks them with testimonial value they do not have. The jury sees impressive charts and hears accounting terminology of a CPA explaining them. Plainly, the jury either viewed the charts as expert testimony (despite disclaimers) or at least gave the argument undue weight because they believed it had the sanction of an expert.

Furthermore, defendants were deprived of effective cross-examination. They should have been allowed full cross-examination.

> *Standard Oil Company of California v. Moore, supra;*
>
> *William H. Rankin Co. v. Associated Bill Posters,* 42 F.2d 152 (2d Cir. 1930), cert. denied 282 U.S. 864 (1930).

While defendants were permitted limited cross-examination on the method of computation, no cross-

examination was permitted on the validity of the entire approach for the purpose of arriving at a value. (Tr. III: 1141, 1152-54.) Thus plaintiff presented the jury with impressive figures prepared by a CPA as "proof" of a going concern value in 1965 and at the same time immunized the witness from cross-examination.

Since plaintiff used the figures to construct a going concern value, obviously defendants should have been allowed to cross-examine the witness on them. *Berguido v. Eastern Air Lines, Inc.*, 317 F.2d 628, 636 (3d Cir. 1964), cert. denied 379 U.S. 852. If Mr. Caldwell was not responsible for the assumptions underlying the charts, then the person responsible should have testified and been subject to cross-examination. *Berguido v. Eastern Air Lines, Inc., supra.* That it was counsel does not change matters. If he is responsible for the assumptions, he should have taken the stand and been subject to cross-examination. 6 *Wigmore on Evidence* (3d ed. 1940) §1806.

The error was substantial and prejudicial. The exhibits were the crux of plaintiff's claim of damages.

2. The exhibits were inadmissible as expert opinion

Plaintiff offered the charts as mathematical representations of counsel's damage theory. Cross-examination of Caldwell, however, made clear that he used some accounting in constructing them (Tr. 1175), although the extent was never disclosed. However, the trial court viewed the exhibits, in part at least, as

expert opinion, since it permitted the jury to so treat them. (Tr. III: 1172-73; VIII: 3193.)

The result was that the exhibits came in as a hybrid between expert opinion and the argument. They should have been excluded on the further ground that to whatever extent they represented expert opinion, the threshold requirements for their admission had not been met.

a. **No Foundation Was Laid to Qualify Caldwell As Competent to Assess Plaintiff's Market Value or to Estimate Its Future Profits**

A party seeking to introduce expert opinion in evidence must first lay a foundation showing that the witness possesses some specialized skill that makes his opinion admissible.

> *Spitzer v. Stichman,* 278 F.2d 402, 409 (2d Cir. 1960);
>
> *Callendar v. Hunter Motor Lines, Inc.,* 327 F.2d 754 (4th Cir. 1964), cert. denied 379 U.S. 852;
>
> *Weber v. Brunswick Corp.,* 368 F.2d 480 (10th Cir. 1966);
>
> *State v. Damico,* 213 La. 765, 35 So.2d 654 (1948);
>
> 2 *Wigmore on Evidence* (3d ed.) §§560, 1923.

Here, the charts related to market value in 1965 and anticipated profits insofar as they would be relevant in determining market value. No attempt whatever was made to establish Caldwell's expertise in this regard. The only indication of any expertise was counsel's remark:

> "Mr. Blecher: What I said in the pre-trial statement is that though this witness is an expert, as to his qualifications, he will not in any sense be giving us 'expert testimony' in the traditional sense of this consequence." (Tr. III: 1072-73.)

Counsel then stated that he was being offered only as "an expert in computation" (Tr. 1073) and that he possessed no expertise relative to the valuation of a business. (Tr. III: 1141, 1152-54.) Caldwell confirmed this. (Tr. III: 1155-56.)

b. The Exhibits Were Irrelevant to the Issue, Which Was the Market Value of the Business

The charts were introduced to prove that plaintiff had a market value higher than the value of its tangible assets on liquidation. To show this, they purported to prove that plaintiff had a high profit potential. The additional value of a business based on expected future profits is its "going concern" or "goodwill" value. *Standard Oil Company of California v. Moore, supra.* In that case, this Court held that the appropriate factors to be considered in determining if a business had a going concern value are those ". . . which would influence a prospective purchaser" and that any value from an asset not transferable was irrelevant. (251 F.2d 219-220.)

Here, nothing indicated that the projections in the exhibits would influence a prospective purchaser. Attempts to ascertain their relevance were rebuffed on the ground that Mr. Caldwell knew nothing about valuing a business. (Tr. III: 1141, 1152-54.) No other

evidence was introduced to establish a logical connection between these projections and the value of the business to a prospective purchaser.

The charts included income from sources not transferable, e.g., income from the Seagram and Barton distributorships, although plaintiff had no transferable franchise with either. This was admitted. (Tr. II: 459.) The contracts with Seagram are Exhibits S-10, S-11 and S-12. There was no contract at all between Hawaiian Oke and Barton. (Tr. II: 503.)[18]

The projections included income from a leasehold which in 1963 had been transferred to Thelma Wong for the express purpose of preventing it from going with the corporation if it were ever sold. (Tr. I: 259-61.) Notwithstanding the transfer, the corporation collected the rents until October 1965. (Tr. VII: 2609.) The leasehold was not owned by plaintiff in 1965. To obtain it a purchaser would have had to buy it from Mrs. Wong. Any income from it was not properly included in profit projections designed to show market value.[19] Proposed instructions B-50 and M-11, which would have made this clear, were refused. (Tr. VIII: 3030-3031, 3114.)

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[18]The contracts did not add to the value of the business. The remaining distributorship contracts were not sold in liquidation. Old Mr. Boston distributorship was simply taken over by Sam Wong. (Tr. I: 303; IV: 1555; V: 2125.)

[19]Any expenses properly attributable to the rental property should of course also be excluded. Plaintiff's financial statements, however, do not indicate the amount of such expenses.

c. The Exhibits Are Based on Assumptions Not Warranted by the Evidence

Plaintiff's own financial statements, summarized in Exhibit P-1, show plaintiff's earnings history:

Year	Net Profit or (Loss) from Operations	Total Net Income (Loss)
1959	$(55,486.63)	$(45,589.73)
1960	$(55,583.20)	$(46,240.93)
1961	$(65,922.28)	$(50,179.54)
1962	$(16,505.59)	$ 8,060.80
1963	$(13,808.63)	$ 2,640.99
1964	$(18,767.92)	$ 2,497.85

Despite this Exhibit P-2 purported to show that plaintiff's total net income in 1965 would have been $45,256 had it continued in business throughout the year. Exhibit P-3 purported to show that profits for the next four years would have been approximately $53,000, $62,000, $72,000 and $82,000 respectively. No evidence showed any change in plaintiff's business to explain this remarkable turnabout. These figures were derived by a series of manipulations. These can be summarized:

(1) Plaintiff compared its income for the first six months of 1964 (Ex. P-105) with the full year (Ex. S-3) and found that second-half sales and costs were higher than the first half, while operating expenses were lower.

(2) It assumed that the same pattern would have existed in 1965 and applied the 1964 second-half percentages to its 1965 first-half figures.[20] Result: profit

[20] The result was an *increase* in sales of $230,000 and a *decrease* in operating expenses of $80,000. The projected total sales of $1,506,237 exceeded the $1,200,000 of sales predicted by Ted Wong by over $300,000. (Tr. II: 596, 597, 644, 646.)

for 1965, $45,256 or an 1800% increase over the previous year.

(3) It then reviewed the actual figures for 1962-1964 with the hypothetical figures for 1965 to determine a "trend". It found an "annual average percentage increase" of 9.23% for sales and 11.6% for gross profits.

(4) It selected (without explanation) one-half of the gross profit increase, or 5.8%, as the average annual percentage increase for operating expenses.

(5) It applied these percentages to the hypothetical 1965 figures, obtaining an average annual projected profit of $63,349 for the years 1965-1969.

(6) It capitalized the $63,349 by multiples of from 5 to 10 to suggest the fair market value of the business in 1965.

(7) Finally, it deducted $149,611, a figure purporting to represent the amount distributed to stockholders in liquidation, to produce the value of the business.

Each of the foregoing assumptions is without factual or rational basis, some in direct conflict with the evidence.

Plaintiff's records show that while its operating expenses in the second-half of 1964 were about $3000 lower than those in the first-half, for the second-half of 1963 they were about $2000 higher than the first-half (Exs. P-1, M-25), and for the second-half of 1962, they were about $3000 higher than the first-half (Exs. P-1, M-24).

The assumption is nonsensical as well as arbitrary. The application of the 1964 percentages to the 1965 first-half figures results in a hypothetical $230,000 increase in sales and a hypothetical $80,000 decrease in operating expenses. In other words, the greater the volume, the lower the expenses. Mr. Caldwell conceded that normally one would expect the opposite. (Tr. III: 1236.) Plaintiff's own financial statements show that its operating expenses normally followed sales. From 1959 to 1963, operating expenses rose when sales rose and fell when sales fell. (Ex. P-1.) The one exception was 1964, when an increase in sales was accompanied by an $872 decrease in operating expenses. (Ex. P-1.)

Although Caldwell gave no explanation for the absurd result, the answer is clear. The application of the 1964 percentages to the 1965 first-half figures was based on a false assumption. Caldwell noted that plaintiff's operating expenses for the first-half of 1965 had declined, while its sales increased. (Tr. III: 1236; Ex. P-2.) Rather than attempting to find the explanation (the July 1 tax increase), he merely accepted the advice of plaintiff's counsel that there was nothing out of the ordinary about the first six months of 1965. (Tr. III: 1093-1094.)

This assumption flies directly in the face of the evidence and destroys the probative value of the exhibits. Had Caldwell looked at plaintiff's books, he would have learned that the first six months' figures were unusual. Plaintiff's monthly sales for the first six months of 1962-1965 were:

	1962	1963	1964	1965
January	$ 81,796	$ 86,085	$ 89,904	$ 82,455
February	82,405	84,306	93,304	100,184
March	97,855	101,156	97,968	113,858
April	90,001	100,364	114,825	104,497
May	86,793	95,649	105,158	93,667
June	97,751	97,590	99,092	212,318

(Exhibit M-52)

Twenty-three of these twenty-four months show sales of between $81,000 and $115,000. One month, June 1965, shows sales of $212,000, more than double the sales of any other June and almost $100,000 higher than the sales of the next highest month.

In the spring of 1965, the Hawaii Legislature increased the excise tax from 16% to 20%, effective July 1, 1965, Act 155, S.L. Hawaii 1965. This led retailers to stock up in June to avoid the tax increase (Tr. IV: 1693-94.)

The June balloon of plaintiff's sales was explained by Ted Wong in letters to the suppliers. On April 23, 1965, he wrote:

> Heavy buying—3-4 months supplies is expected in early June. Therefore heavy inventories must be stocked as soon as possible. . . . we will be under tremendous workloads to sell in June . . . . (Ex. M-57.)

This was followed three days later:

> Reference to my letter on TAX situation in Hawaii. Will appreciate whatever you can do to RUSH these goods to us to arrive Honolulu about June 1. . . . (Ex. M-58.)

Mr. Caldwell, relying on Wong and counsel, assumed that the tax increase had no bearing on sales or earnings for the first six months of 1965. (Tr. III: 1094, 1100, 1237.) He testified:

> Q. You don't know anything how the tax increase affected the business?
>
> A. No sir, except to the extent that I was advised that it had no bearing on the first six months. (Tr. III: 1237.)

The assumption that there was nothing unusual about the first half of 1965 was patently false. The resulting hypothetical \$230,000 increase in sales, \$80,000 decrease in operating expenses, and 1800% increase in net income are absurd conclusions.

For the trial court to permit the jury to decide the case on this kind of "evidence" was ". . . to give judicial blessing to a decision based on speculation, surmise and conjecture." *Wolfe v. National Lead Co.*, 225 F.2d 427 (9th Cir. 1955), cert. denied 350 U.S. 915 (1955). Nothing in *Story Parchment, Bigelow* or any other case sanctions this kind of exercise in fantasy.

The liberal standard of proof established by *Story Parchment* and *Bigelow* assures that an injured plaintiff will not be denied recovery simply because the nature of the violation makes computation of the precise amount impossible, but it does not go so far as to give competency to any figures proffered by a plaintiff, regardless of how unfounded or false the assumptions are upon which they rest.

To permit a verdict to be rendered on the basis of this sort of material makes a mockery of the law of

evidence and trial by jury. This was recognized by Judge Friendly in *Herman Schwabe, Inc. v. United Shoe Machinery Corp.*, 297 F.2d 906 (2d Cir. 1962, cert. denied 369 U.S. 865 (1962)):

> There is no bright line that divides evidence worthy of consideration by a jury, although subject to heavy counter-attack, from evidence that is not. Especially because of the guaranty of the Seventh Amendment, a federal court must be exceedingly careful not to set the threshold to the jury room too high. Yet it is the jury system itself that requires the common law 'judge, in his efforts to prevent the jury from being satisfied by matters of slight value, capable of being exaggerated by prejudice and hasty reasoning . . .' These comments are especially pertinent to an array of figures conveying a delusive impression of exactness in an area where a jury's common sense is less available than usual to protect it. (p. 912.)

The soundness of this caveat is recognized in many cases where the admission of fanciful damage theories based on unreasonable or fallacious assumptions has been held erroneous.

In *Sunkist Growers, Inc. v. Winckler & Smith Citrus Prod. Co.*, 284 F.2d 1, 30 (9th Cir. 1960), mod. 289 F.2d 933, rev'd on other grounds, 370 U.S. 19, this Court held it error to admit testimony of an expert accountant in response to a hypothetical question embodying unfounded and fallacious assumptions:

> The expert opinion was a guess based on conditions contrary to fact. (p. 34.)

To the same effect:

Volasco Products Co. v. Lloyd A. Fry Roofing Co., supra;

Syracuse Broadcasting Co. v. Newhouse, 319 F.2d 683, 688 (2d Cir. 1963);

Emich Motors Corp. v. General Motors Corp., 181 F.2d 70, 83-84 (7th Cir. 1950), mod. on another ground, 340 U.S. 558 (1951);

Baush Machine Tool Co. v. Aluminum Co. of America, 79 F.2d 217 (2d Cir. 1935).

See also:

Taylor v. Heller & Co., 364 F.2d 608 (6th Cir. 1966);

Carroll v. Magnolia Petroleum Co., supra.

In *Lewis v. United States,* 369 F.2d 595 (5th Cir. 1966), the court said:

> . . . (I)n order for the opinion to have any value, it must be based on assumptions which the trier of the facts can find to have been proved. (p. 602.)

The charts embody other unwarranted assumptions. Plaintiff determined that its hypothetical 1965 sales were 18.31% greater than 1964 sales. It then used the 18.31% figure to arrive at a projected sales growth rate of 9.23%. Plaintiff's actual growth rate for 1963 and 1964 was 4.7%. The 9.23% figure has no evidential basis and represents nothing more than unfounded optimism. *Baush Machine Tool Co. v. Aluminum Co. of America, supra* at 227.

The use of one-half the projected gross profit growth rate, or 5.8% for the projected increase in operating expenses was purely arbitrary. No explanation was given, and the rationale, if such there was, underlying its selection remains a mystery. Opinion evidence based on unexplained assumptions is inadmissible.

> *Lessig v. Tidewater Oil Co.*, 327 F.2d 459, 473 (9th Cir. 1964), cert. denied 377 U.S. 993 (1964);
>
> *Emich v. General Motors Corp., supra* at 83.

In the *Lessig* case, this Court stated:

> Such opinion testimony is admissible, but only if based upon facts which support it. . . . There was no offer to show how his estimate was made. The testimony was inadmissible, absent the foundation. . . . (p. 473.)

In addition, no explanation was given why the particular earnings multiples appearing in Exhibit 5 were selected or whether any of them would be appropriate in valuing plaintiff's business on cross-examination was emasculated. (See Tr. III: 1146.)

Again, the $149,611 attributed to distribution to the stockholders was pure speculation. This was never authenticated by any witness.

On cross-examination, Ted Wong was asked about the figures that appeared on Exhibit P-5 as follows:

1965 Distributions	$101,880
1966 Distributions	43,853
Balance of net assets	3,878
	$149,611

Wong was unable to vouch for them. He said he "believed" the $101,880 represented cash received by the stockholders (Tr. V: 1922) and that the $43,853 represented distributions in kind. (Tr. 1924.) When asked how it was arrived at:

> I believe the attorney-accountant, to the best of my knowledge, took the book figure of what was on the books and pulled it out. That's about all I know about that. (Tr. V: 1924.)

No witness attested to the accuracy of the figure. Nor was there any evidence that the book value, if in fact that was the figure used, represented the actual value of the assets distributed or even a reasonable estimate.

This is not a case where any unlawful conduct of defendants made ascertainment of the actual figures impossible. The amount realized on liquidation is uniquely within plaintiff's knowledge. It must produce the best available evidence of the impact of defendants' conduct on its business. *Riss & Co. v. Ass'n of American Railroads,* 190 F.Supp. 10, 18 (D. D.C. 1960). Although verdicts based on speculation and guesswork are not permitted in any event, this principle has especial force when the speculation is due to the plaintiff's failure to come forward with proof peculiarly within its possession.

In sum, the exhibits are based on an assortment of hearsay, conjecture, surmise and false and unfounded assumptions, some directly contrary to the undisputed facts.

3. **The court erred in allowing use of McKesson as a "yardstick" to measure plaintiff's market value**

Exhibit P-4 represented an alternate method of valuing the business. It used McKesson figures to project plaintiff's profits for 1965-1969. The average thus obtained was capitalized in Exhibit P-5 in the same manner as the $63,349 figure produced by Exhibit P-3. These computations suffer from the defects discussed above, and further, no foundation was laid to establish the comparison. (Tr. III: 1136, 1139.)

Exhibit P-4 was constructed as follows:

(1) Mr. Caldwell determined McKesson's ratio of net income (before taxes) to sales for the fiscal years ending March 31, 1963, 1964 and 1965.

(2) He determined that McKesson's net profit averaged 3.05% of net sales for the three-year period.[21]

(3) He then assumed that had plaintiff remained in business, its earnings would have borne the same relationship to its sales.

(4) The 3.05% was then applied to plaintiff's hypothetical sales from Exhibits P-2 and P-3, which produced an average annual projected profit of $55,240.

The "yardstick" approach is permissible where two businesses are comparable and where the method of

---

[21]The use of the pre-tax figure was meaningless for purposes of valuing the business. The only meaningful figure is the amount that would be available as a return on the purchaser's investment. McKesson's average profit after taxes was 1.37%. (Ex. P-29.)

comparison itself is rational. *Twentieth Century-Fox Film Corp. v. Brookside Theatre Corp.,* 194 F.2d 846 (8th Cir. 1952), cert. denied 343 U.S. 942 (1952). But where no sound basis for comparison is shown or the assumptions underlying the comparison are unsupported, the "yardstick" approach has been rejected.

Flintkote v. Lysfjord, supra;

Volasco Products Co. v. Lloyd A. Fry Roofing Co., supra at 392;

Fargo Glass & Paint Co. v. Globe American Corp., 201 F.2d 534, 540 (7th Cir. 1953); cert. denied 345 U.S. 942 (1953);

Homewood Theatre v. Loew's, Inc., 110 F. Supp. 398 (D. Minn. 1952).

There was no evidence of the comparability of McKesson and Hawaiian Oke. No attempt was made to determine if their profit margins, facilities or operations were comparable. (Tr. III: 1137-39.)

Plaintiff simply assumed that every liquor distributor in Honolulu would have the same profit margin. This broad-brush approach has been rejected by the courts. While plaintiff need not show that the two businesses are comparable in detail, the cases make clear that it must do more than prove they are in the same general business. The evidence in the record establishes the lack of comparability.

Comparison of the actual profit margins of the two firms removes any doubt as to the invalidity of the "yardstick" test. According to plaintiff's own figures

(Ex. P-1) its profit margins, including rental income, were:

Year	Sales	Total Income	Ratio of Total Income to Sales
1962	$1,161,526.02	$8,060.80	0.70%
1963	1,215,602.13	2,640.11	0.20%
1964	1,273,152.41	2,497.85	0.20%
		Average:	0.40%

Thus, McKesson's 3.05 ratio of net income (before taxes) to sales was over seven and one-half times that of plaintiff—even when the latter's rental income is included. Plaintiff, without explanation, urged that for 1965-1969, it was reasonable to apply McKesson's profit margin to plaintiff's hypothetical sales. This assumption was not only unfounded but in direct conflict with the evidence.

Exhibit P-4 piles speculation on speculation. It does not rise to the level of "relevant data." No verdict based on such "evidence" could possibly meet the "just and reasonable" test of the *Bigelow* case.

B. Evidence of Expressions of Interest in Purchasing Plaintiff's Business Was Erroneously Admitted

Ted Wong testified over objection that certain individuals expressed interest in purchasing its business. (Tr. I: 209-219.) This testimony was irrelevant.

If a mere expression of interest proves anything, it proves no more than that plaintiff's business had some value. But this was not the issue. The only questions before the jury were:

(1) Did the business have any value *over the amount realized on liquidation,* and

(2) If so, how much?

In no instance mentioned by Wong was there an actual offer nor any mention of price. Two persons that indicated interest abandoned it on seeing plaintiff's financial statements. (Tr. V: 1812, 1823-34.)

Despite lack of probative value, the evidence was received and the jury told that it could use such expressions in determining damages. (Tr. VIII: 3216-17.) The court also admitted a letter expressing an interest. (Ex. P-54; Tr. I: 211-215.) The admission of Wong's testimony and this letter, coupled with the court's instruction, was prejudicial error. *Dantzler v. Dictograph Products, Inc.,* 309 F.2d 326 (4th Cir. 1962), cert. denied 372 U.S. 970.

C. The Court Erred in Admitting Evidence of Plaintiff's Out-of-Pocket Losses

Plaintiff's annual profits and losses from 1959 through 1966 were admitted over objection.

The only out-of-pocket losses recoverable are those proximately caused by defendants' unlawful conduct. *Flintkote v. Lysfjord, supra.* Since the conspiracy was alleged to commence in June 1965, it could hardly have caused pre-1965 losses. As to 1965 and 1966, the exhibit shows simply that losses were sustained. No attempt was made to establish a causal connection between them and any act of defendants. From all that appears, the figures include plaintiff's normal operating losses sustained in every one of its

last six years in business. Absent a showing of causal connection, the exhibit was inadmissible. *Talon, Inc. v. Union Slide Fastener, Inc.*, 266 F.2d 731 (9th Cir. 1959); *Dantzler v. Dictograph Products, Inc., supra* at p. 320.

V. ERRORS IN INSTRUCTIONS ON DAMAGES

A. The Instructions Given

Over objections of defendants (Tr. VII: 2821, 2822, 2854, 2855, 2860, 2863-2869, 2879, 2881-2883; VIII: 2931, 2944, 2959-2962, 2965, 2967), the court gave plaintiff's instructions 26 (revised) and 37). These instructions were erroneous:

(1) The jury was told it could consider the question of future profits. (Tr. VIII: 3216.) This was misleading. Future profits were not an issue except as they bore on market value in July 1965. Especially in view of Caldwell's exhibits and Ted Wong's testimony, all relating to future profits, the effect of this instruction was to permit the jury to make an award for future profits.

(2) The instructions permitted the jury to take into account the expressions of interest of third parties in acquiring plaintiff's business. (Tr. VIII: 3217.) The irrelevance of such expressions of interest to the actual damage has been pointed out above.

(3) The instructions permitted the jury to award recovery for out-of-pocket losses in 1965 and 1966. (Tr. 3217.) There was no evidence of any out-of-pocket losses caused by defendants.

(4) The instructions permitted the jury to treat the Caldwell exhibits as bona fide expert testimony when they were nothing more than the arguments of counsel. (Tr. VIII: 3193.)

B. The Instructions Refused

(1) Instructions B-50 and M-11, which would have instructed the jury that they were to disregard the rental income from the leasehold property held by Thelma Wong, were refused by the court over objection. (Tr. VIII: 3030, 3031, 3114.) The rental income made the difference between a small profit and a perfect record of losses. The jury might well have viewed the damage question in an entirely different light had they been dealing with a business with no past profits at all, rather than being permitted to view plaintiff as a corporation that had started to earn small profits. The inclusion of the rental income compounded the errors in the Caldwell exhibits.

(2) Defendants submitted an instruction that would have told the jury that Exhibits P-2, P-3, P-4 and P-5 were not to be treated as expert testimony. (Instr. B-51; Tr. VIII: 3033.) This was vital in view of the court's own instruction expressly allowing the jury to consider any charts prepared by an accountant as bona fide expert testimony. (Tr. VIII: 3193-94.) While it is arguable that the instruction given might have some justification with respect to Exhibits P-106 through P-114, it was grossly improper as to the projections.

(3) The court refused (Tr. VIII: 3035) to give Instruction B-52, which would have told the jury:

> You are not to assume that a business must be worth more while it is operating than it is after it stops operating. This may or may not be true.

This instruction fairly states the law. See, *Standard Oil of California v. Moore, supra,* and defendants were entitled to it. There was no basis for its refusal. (Tr. VIII: 3035, 3216, 3217.)

(4) Instruction M-C would have made clear to the jury that plaintiff was not claiming any lost or prospective profits. Especially in view of the instruction actually given by the court, defendants were plainly entitled to it. However, it was refused. (Tr. VIII: 3122-23.)

The court's charge to the jury was clearly erroneous.

CONCLUSION

We submit that this verdict cannot stand. There was no evidence of any agreement between Barton and Seagram, no evidence of any unreasonable, restraint, no evidence of any unlawful or anti-competitive purpose or any attempt to coerce or injure Hawaiian Oke. Giving plaintiff the benefit of every reasonable inference from the facts proved, the case should have been dismissed at the close of plaintiff's evidence.

The court below committed repeated errors in the omission and exclusion of evidence and in charging the jury. Despite this, there still was no evidence on

which the jury could have found a conspiracy, or an unreasonable restraint of trade or a per se violation of the Sherman Act. Nor was there any competent evidence in the record that plaintiff suffered damage resulting from any unlawful conduct of defendants. The judgment should be reversed with direction to enter judgment dismissing the complaint.

Dated, Honolulu, Hawaii,
February 14, 1968.

Respectfully submitted,

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and The House of Seagram, Inc.

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I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

J. Garner Anthony,
Attorney.

(Appendix Follows)

Appendix

Appendix A

TABLE OF EXHIBIT REFERENCES

PLAINTIFF'S EXHIBITS

Exhibit No.	Identified	Offered	Received
1	Tr. 1037	Tr. 1039	Tr. 1039
2	1092	1095	1104
3	1092	1109	1129
4	1092	1130	2679
5	1092	1147	2679
6	1092	1149	1150
7	1039	1040	1040
9	1043	1046	1047
17	1089	1090	1092
17-B	1079	1089	1089
18	755	755	758
19	755	755	758
20	755	755	758
21	755	755	758
22	1085	1085	1086
23	1085	1085	1086
24	1085	1085	1086
25	755	755	758
27	755	755	758
28	755	755	758
29	755	755	758
30-41	3037	3037	3038
42	1014	1014	1014
43	1010	1012	1013
54	211	212	215
59	220	220	221
63	175	176	176
64	176	178	178
65	2660	2660	2660
67	1348	1348	1349
68	175	176	176
69	806	806	807
70	177	178	178
71	684	686	686
72	366	366	366
73	737	738	738
74	737	738	747
75	743	747	747
76	2400	2400	2400
77	1449	1449	1449

Exhibit No.	Identified	Offered	Received
79	1452	1453	1453
81	1621	1621	1623
82	1621	1621	1629
83	1585	1586	1586
84	1587	1588	1589
88	161	161	162
99	187	205	206
100	188	205	206
101	578	578	579
102	600	600	600
103	602	603	603
104	609	610	610
105	1008	1009	1010
106	1047	1048	1048
107	1050	1051	1052
108	1055	1055	1055
109	1057	1058	1058
110	1060	1061	1061
111	1062	1062	1063
112	1065	1065	1065
113	1067	1068	1069
114	1073	1078	1078
115	876	880	880
116	936	936	936
117	938	938	938
118	1021	1023	1030
119	1023	1023	1030
120	1031	1032	1033
120-B	2599	2689	2689
121	1030	1032	1033
122	1086	1087	1087
123	1787	1788	1790, 1801
124	1800	....	....
125-143	1998	2000	2002
144	2023	2023	2024
145	2006	2006	2006
146	2007	2008	2008
147	2016		
148	2017		
149	2017		
150-154	2031	2052	2052
155	2116	2117	2117
156	2117	2117	2118

SEAGRAM'S EXHIBITS

Exhibit No.	Identified	Offered	Received
1	Tr. 572	Tr. 572	Tr. 573
2	572	572	573
3	572	572	573
4	572	572	573
5	572	572	573
6	3038	3038	3038
10	570	570	571
11	570	570	571
12	570	570	571
13	2541	2549	2549
14	2549	2558	2559
17	2513	2513	2514
18	2514	2514	2514
19	2514	2514	2514

McKESSON'S EXHIBITS

Exhibit No.	Identified	Offered	Received
2	Tr. 3039	Tr. 3039	Tr. 3039
3	3039	3039	3039
4-16	3039	3039	3039
18	3040	3040	3040
19	1988	1989	1989
20	1919	1921	1921
21	1920	1921	1921
22	1919	1921	1921
22-a	1920	1921	1921
23	627	630	632
24	1099	....	1103
25	1099	....	1103
26	1197	1197	1198
28	2128	2128	2129
29	1706	1707	1708
32	2133	2133	2133
33	2138	2138	2138
34	2171	2171	2171
35	1826	1826	1827
37	2586	2586	2586
39	2584	2584	2584
41	1834	1835	1835
42	1871	1871	1872
43	1829	1829	1829
44	1830	1830	1831
45	2670	2672	2672
47	1700	1700	1701
48	1722	1721	1722
49	1722	1721	1722
50	1721	1721	1722
51	1721	1721	1722
52	1722	1721	1722
53	1738	1747	1749
54	1750	1757	1758
55	1760	1767	1767
56	1768	1769	1770
57	1696	1697	1697
58	1701	1702	1702
59	1703	1704	1704

Exhibit No.	Identified	Offered	Received
60	1699	1699	1699
61	1867	1868	1868
62	1911	....	....
63	2232	2235	2235
64	2233	2235	2235
65	2235	2235	2235
66	2239	2239	2239
67	2242	2242	2243
68	2243	2244	2244
69	2244	2244	2244
70	2244	2244	2244
72	2063	2063	2064
73	2076	2077	2077
74	2198	2199	2199
75	2218	2218	2219
76	2704	2704	2705

BARTON'S EXHIBITS

Exhibit No.	Identified	Offered	Received	Rejected
1	Tr. 316	Tr. 316	Tr. 316	
2	3038	3038	3038	
3	2196	2196	2196	
4	3038	3038	3038	
5	3038	3038	3038	
6	516	516	517	
7	284	286	287	
9	3038	3038	3038	
10	2190	2191	2191	
12	3038	3038	3038	
13	3038	3038	3038	
13-A	1925	1925	1925	
14	1932	1936	1936	
14-A	1996	1996	1997	
14-B	1996	1996	1997	
14-C	1996	1996	1997	
22	2316	2316	2316	
23	483	484	484	
24	486	486	487	
25	488	488	488	
28	489	489	489	
29	491	491	491	
33	492	492	492	
34	826	827	827	
35	494	494	494	
37	2317	2317	2317	
38	495	495	496	
42	497	497	498	
44	476	476	476	
45	478	478	478	
48	499	499	499	
49	480	480	480	
57	523	523	525	
58	525	525	526	Stricken—910
59	525	525	526	Stricken—910
60	525	525	526	Stricken—910
61	525	525	526	Stricken—910
63	2317	2317	2317	
64	2318	2318	2318	

Exhibit No.	Identified	Offered	Received	Rejected
66	841	841	841	
67	862	863		867
68	1344	1345		1346
70	1980	1986	1987	
71	2086	2085	2086	
72	2086	2086	2086	
73	2086	2086	2086	
74	2086	2086	2086	
75	2086	2086	2086	
76	2147	2150	2151	
77	2157	2157	2158	
78	2160	2160	2160	
79	2165	2165	2165	
80	2167	2168	2168	
81	2201	2202	2203	
82	2201	2202	2203	
83	2201	2202	2203	
84	2315	2315	2315	
*84	2688	2688	2688	
85	2315	2315	2316	
86	2601	2601	2601	
87	2689	2689	2689	

*Substituted for first Exhibit B-84.

Appendix

Exhibit S-17

JOSEPH E. SEAGRAM & SONS, INC. (Manufacturer)

Edgar Bronfman, President
Jack Yogman, Executive Vice President

THE HOUSE OF SEAGRAM, INC.

(distributing agent for Joseph E. Seagram & Sons, Inc.)

Unincorporated divisions of THE HOUSE OF SEAGRAM, INC., distributing products in Hawaii:

EAGRAM	CALVERT	FOUR ROSES	FRANKFORT
	Al Fleischman (V.P. Sales)	Jack Wishny (President)	Roy Flint (V.P.)
	Arthur Murphy (President)	Edwin Kaufman (Div. Mgr.)	Max Morgenthau (former Div. Mgr.)
	Gerald Novak (Div. Mgr.)		Joe Flick (Div. Mgr.)
	Emilio Gonzales (former Sales Mgr.)		

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cKESSON & ROBBINS	BARTON	HAWAIIAN OKE
. J. Bertrand xecutive V.P.	Ralph Ettlinger Executive V.P.	Henry Awa Wong President
oe Cotler .P. Asst. to xec. V.P.	Sheldon Friedman Sales Manager	Theodore K. T. Wong General Mgr., V.P.
. J. Maloney ice President	Oscar Getz Chairman of Board	Samuel F. Wong Manager (sales)
be Kauhane ivision Mgr.	Arnold Frisch Former V.P.	David K. K. Wong General Mgr. to 1961
	Sydney Weinstock V.P. (Sales Mgr.)	Thelma Wong President & Director
	Ralph Silver Fin. V.P.	Dick Yin Wong Secretary-Director

SPECIFICATION OF ERRORS

ERROR NO. 1

The court erred in holding that the evidence was legally sufficient to support the verdict.

It erred in denying the motion for a directed verdict (Tr. IV: 1670, 1672, 1677; R. 279, 282), in denying motions for judgment n.o.v. (R. 300, 302, 305) and in denying the motion for a new trial (R. 302, 306).

ERROR NO. 2

The court erred in admitting the testimony of Ted Wong that Friedman of Barton told him that he (Friedman) did not know why Barton had changed distributors, but "guessed" that it was because of a "deal" between Barton and McKesson in California and that he "guessed" Seagram changed because of another "deal" between Seagram and McKesson in Europe; and in overruling motions to strike this testimony. (Tr. I: 167-168; II: 556-565.)

1. The Testimony and Objections

Ted Wong testified on direct (Tr. I: 167-170):

> Q. Did you have any further conversation with Mr. Friedman . . . as to the reasons why your distributorship arrangements . . . were being terminated?
>
> A. I asked him why this arrangement was being ended, and he told me he didn't know; probably it would be a deal that McKesson would get Barton distribution in the West Coast. . . .

Mr. Anderson: . . . it sounded to me very much like speculation, hearsay on hearsay.

. . . .

The Court: The objection on the basis set forth is overruled. However, it is being received not for the purpose of the representation that it is true, . . . but . . . to show the state of mind. . . . (Tr. I: 168.)

The Witness: And in turn they would receive distribution here in Hawaii. And I asked him why would Seagram be involved. And he stated, well, maybe they have a deal someplace, maybe in Europe.

The Court: The same objection and the same ruling. This is simply to show what Friedman is saying at the time, . . .

Mr. Anderson: . . . I object to the testimony that this witness has given concerning the reasons that Friedman announced to him as to why Seagram might be involved in this as clearly, by even Friedman, highly speculative. Second, the state of mind of Mr. Friedman by Mr. Wong is not at issue at this stage of the game, at this point.

Mr. Anthony: ——It is not only hearsay; it is triple hearsay insofar as Seagram is concerned.

. . .

Mr. Anthony: The witness has already given hearsay upon hearsay.

The Court: Have you any further argument?

Mr. Anthony: No.

The Court: The objection is overruled, for the same reasons.

Mr. Choy: The same objection.

The Court: Overruled for the same reasons

> . . . There is one other inference you are entitled to, but certainly this is for you to decide . . . you are entitled to analyze Friedman's statement in the light of whatever he says by way of excuse . . . and see what weight you shall give to the reasons he gave for the cancellation of this arrangement. That is an inference which you may or may not draw. You are finders of the fact and can take from what was said on this occasion whatever inference you want. (Tr. I: 170, 171.)

On cross-examination, the following occurred (Tr. II: 557-558):

> Mr. Anthony: You recall that you testified earlier on the taking of the deposition that this was just a guess on his part. Do you remember that?
>
> A. Yes.
>
> Mr. Anthony: Now, if your Honor please, I move to strike all of this testimony in regard to that conversation, and I respectfully request that your Honor take a look at 6 Wigmore, page 178. Mind you, this is a hearsay declaration. It is not based on any testimony or knowledge your Honor, and it is a guess. And Wigmore says:
>
> "The witness must speak as a knower, not as a guesser."
>
> . . . .
>
> The Court: Who is the witness here?
>
> Mr. Anthony: This is the witness.
>
> The Court: No.
>
> Mr. Anthony: The declarer is the witness.
>
> The Court: Friedman is the witness?
>
> Mr. Anthony: That's right. And this was a guess, according to this witness.

The Court: It isn't this witness' conclusion.

Mr. Anthony: This was also Friedman's conclusion . . . And I now move to strike the entire testimony, both on direct and the present testimony of this witness.

The Court: Motion denied. Objection overruled.

Wong reaffirmed that what Friedman had told him about the possible deals was just a "guess" and that he knew of no facts to support it. (Tr. II: 561--564.) The motion to strike was renewed and denied. (Tr. II: 563.)

2. Grounds of Error

a. The fact that Friedman said that he guessed that there were "deals" elsewhere was irrelevant to any issues in the case and prejudicial to all defendants.

b. The only possible relevance of such a statement was to establish that there were in fact such "deals," in which case the evidence is inadmissible as hearsay and speculation.

ERROR NO. 3

The court erred in admitting evidence comparing plaintiff's performance before the change of distributors with McKesson's performance thereafter.

1. The Evidence and the Objections

a. Over objection, the court admitted Exhibits P-19, P-20, P-25, P-28 and P-29.

Exhibit P-19, Barton's Answers to Plaintiff's Second Set of Interrogatories, contains figures showing the 1965 sales of Barton products to McKesson.

Exhibit P-20, Barton's Answers to Plaintiff's Third Set of Interrogatories, contains figures showing 1966 shipments of Barton products to McKesson and 1966 McKesson depletions of Barton products.

Exhibit P-25, McKesson's Answers to Plaintiff's Interrogatories, contains figures showing the 1965 shipments received and sales by McKesson of Barton, Calvert, Four Roses and Frankfort products.

Exhibit P-28 is a list of 1966 shipments received and sales by McKesson of Barton, Calvert, Four Roses, Frankfort, and Seagram Distillers Division products.

Exhibit P-29 is a compilation of McKesson's annual profit and loss statements, including those for 1965 and 1966.

These exhibits compiling sales and shipments after the change of distributors were objected to as irrelevant to any issue in the case but were admitted. (Tr. II: 756, 757.)

b. Barton claimed that it was dissatisfied with plaintiff's product mix, i.e., the ratio of sales of brown goods (scotch, bourbon, whiskey) to sales of white goods (gin, rum and vodka). After questioning Friedman of Barton about plaintiff's ratio, plaintiff's counsel cross-examined on the Portside ratio and purchases in 1966. (Tr. II: 813.)

The objection to the evidence was made. (Tr. II: 813, 815, 821, 824.)

> Mr. Anthony: We take the position that none of this arithmetic, after the filing of the lawsuit in 1966 has the slightest bit of any evidence of any conspiracy in 1965. The only purpose of permitting that evidence in, that is, the performance in 1966, is in an effort on the part of plaintiff to show that in fact there was a conspiracy in 1965. And none of that is relevant and none of it is admissible in evidence . . .

c. Plaintiff offered in evidence Exhibit P-115, a chart containing figures indicating Portside's ratio of Barton brown and white goods after the change of distributors. The exhibit was admitted over the objection that the performance in 1966 after the change of distributors was irrelevant. (Tr. III: 880.)

d. Plaintiff offered Exhibit 17-A, a chart showing McKesson sales of wine and beers, including sales after the alleged conspiracy. The exhibit was received in evidence over the objection that McKesson's sales (1965 and 1966) after the suit was filed were irrelevant.

e. Plaintiff offered Exhibits P-106, P-107, P-108, P-109, P-110, P-111, P-112, P-113 and P-114. These exhibits are graphs representing depletions of Calvert, Four Roses, and Barton products by plaintiff, McKesson, and in certain cases, other distributors. They include depletions by McKesson in 1965 and 1966 after the change of distributors. Objections were

made that the charts for these years 1965 and 1966 were irrelevant. (Tr. III: 1048, 1051-52, 1055, 1058, 1061, 1062-63, 1065, 1068-69.)

f. Plaintiff offered Exhibits P-22, P-23 and P-24, Seagram's Answers to Plaintiff's Second, Third and Fourth Sets of Interrogatories (Tr. III: 1085-1086):

> Mr. Anthony: Your Honor, we object to the introduction in evidence of the answers to these interrogatories, first upon the ground, as already ruled on, that they contained operations in the year 1966. Second, they also enclose within the answers operations of McKesson in addition to the plaintiff.
>
> The Court: Objection overruled.

g. Plaintiff offered Exhibit 17-B, an analysis of the product composition of Portside's 1966 sales. The exhibit was received in evidence over defendants' objection that 1966 figures were irrelevant. (Tr. III: 1089.)

h. Plaintiff examined Abe Kauhane of McKesson on the difficulty in placing Calvert products since the change of distributors. This was objected to on the ground that events after the suit was filed were irrelevant. The objection was overruled. (Tr. VI: 2405.)

2. Error Asserted

Evidence of Portside's performance in 1965 and 1966 after the change of distributors is irrelevant to the issue of conspiracy. It does not logically tend to prove the absence of good business reasons by Seagram and Barton for changing distributors.

ERROR NO. 4

After plaintiff introduced the 1966 Portside figures to prove that Barton had no good business reason for making the change of distributors, Barton offered Exhibit B-67, a letter written in 1966 from Spengler & Sons, another Hawaii distributor, in response to an inquiry by Barton regarding the possibility of changing to Spengler from Portside. The letter B-67 was excluded. (Tr. III: 863-867.)

ERROR NO. 5

The court erred in instructing the jury that if the defendants had agreed or participated in a plan to establish the new McKesson house knowing that the result would be non-dealing with plaintiff, this was a per se violation of the Sherman Act (Tr. VIII: 3206-3209):

> Under the law applicable to this case, any seller, such as any of these three divisions of The House of Seagram, or Barton, may, acting alone, for any reason select the customers with whom it deals or refuses to deal. However, if you find that Calvert, Four Roses, Frankfort and Barton, and/or any combination of them—Calvert and Four Roses, Calvert and Frankfort, Calvert and Barton, Four Roses and Barton, Four Roses and Frankfort, Frankfort and Barton, or all four of them, and that is what I mean by combination—combined or conspired between themselves, as I have heretofore defined "Combine" and "Conspire" to mean the same thing—

to repeat, if you find that Calvert, Four Roses, Frankfort and Barton, or any combination of them, combined or conspired between themselves to terminate Hawaiian Oke as a distributor, then I instruct you that there was, without more, a violation of the antitrust laws.

While the antitrust law guarantees to any business the right to compete on equal terms with its competitors for so much of the distribution market as it can capture and hold by legitimate business means, it does not guarantee an unchanging status quo, that is, the enjoyment of trade built up over the years. It does, however, prohibit independent businesses from becoming associated together in a common plan which they know is bound to reduce another businessman's opportunity to compete in the same market.

Under the same antitrust law, McKesson and Robbins as a distributor had no legal duty to refrain from legitimately competing with Hawaiian Oke, or any other liquor distributor in Hawaii or elsewhere, including solicitation from Calvert, Four Roses, Frankfort or Barton of the distributorship of any or all of their products.

However, if McKesson and Robbins by solicitation of lines, or otherwise, formed a combination or conspiracy with two or more of those sellers to terminate Hawaiian Oke as their respective distributor and to establish Portside as a distributor, then the conduct of McKesson and Robbins, as well as such conspiring sellers, would be a violation of the antitrust laws.

If you find that defendant Joseph E. Seagram and Sons, Inc., the parent corporation, induced

or persuaded any of the parties to initiate or join a combination or conspiracy to terminate Hawaiian Oke as a distributor and establish Portside as a distributor, then the conduct of Joseph E. Seagram and Sons, Inc. would be a violation of the antitrust laws.

If you find that there was in fact any such combination or conspiracy among some or all of the parties defendant, then the business reasons of any such combining or conspiring parties are not material. Nor would it be a defense that the parties defendant may have believed what they were doing was legal. This is because the law provides that combinations or conspiracies involving refusals to deal cannot be excused even for legitimate business reasons.

To restate it a little differently, acting individually, The House of Seagram, its sales divisions, Calvert, Four Roses and Frankfort, as well as Barton, had every right to select their respective customers and acting individually and not in concert to refuse to sell their goods to any person for reasons deemed sufficient by them. For the purposes of this case, a refusal to deal becomes illegal under the Sherman Act only when it is based upon or arises out of a combination or conspiracy, and then it becomes an unreasonable restraint of trade. The fact that a refusal to deal with plaintiff by any of the sellers acting individually may have resulted in an adverse effect on plaintiff's business, does not make a refusal to deal, under such circumstances, a violation of the antitrust laws.

I want you to understand, though, that the business reasons of each and every one of the

> parties may be considered by you in determining whether there was in fact a combination or conspiracy between them, as the plaintiff contends, or whether the parties in fact acted independently, as the defendants contend.
>
> So, if you find that the divisions of The House of Seagram and Barton,—The House of Seagram, Frankfort, Calvert, Four Roses—acted independently for their own business interests and not pursuant to any combination or conspiracy among themselves, or with McKesson and Robbins, to give their several liquor lines to Portside, then there would be no violation of the antitrust laws and you must find in favor of all the defendants.

This instruction is composed mainly of the court's Instruction No. 6, but also contains portions of the court's Instruction No. 5 and the court's revision of Seagram's proposed Instruction No. 7 (R. 252). Defendants objected to Instruction No. 6 (Tr. VIII: 3140-3151) on the ground that, combined with the court's instruction on participation in a common plan (Tr. VIII: 3203, 3212), it permitted the jury to find a per se violation from the mere fact that McKesson solicited Seagram's and Barton's business and that each one knew about the solicitation of the other. Defendants pointed out that if the non-dealing with plaintiff was simply a byproduct of the plan to establish Portside and if Seagram and Barton participated in that plan solely to improve their respective distribution systems, this was not a per se violation of the Sherman Act.

Defendants objected to the court's revision of Seagram's proposed Instruction No. 7 on the same grounds. (Tr. VIII: 3075-3089.)

ERROR NO. 6

The court erred in charging the jury in court's Instruction No. 2 that the unincorporated divisions of Seagram were legally capable of conspiring among themselves. This was repeated in court's Instruction No. 6 (set out in full in Error No. 5, *supra*). The jury was further charged that a verdict against any of the Seagram divisions was to be returned against The House of Seagram, Inc. (Tr. VIII: 3204-3296):

> We have an unusual situation in this case, however. Within The House of Seagram, Inc., are three sales divisions concerning which you have heard much evidence. These sales divisions are Calvert Distillers Company, Four Roses Distillers Company, and Frankfort Distillers Company. In each case it is C-o, period.
>
> You are instructed as a matter of law that, even though these are but three of the several divisions of The House of Seagram, Inc., nevertheless, they are entities or units which, under the antitrust laws, are legally capable of conspiring among themselves as well as with the other named defendants outside The House of Seagram, Inc. For the purpose of clarity, therefore, whenever in these instructions I use the word "parties," that word not only includes Joseph E. Seagram and Sons, Inc., McKesson and Barton, but also each of The House of Sea-

gram's three sales entities, Calvert, Four Roses and Frankfort. . . .

Each of these divisions of defendant House of Seagram, Inc., shall be treated by you as separate entities for the purpose of determining whether or not there has been a combination or conspiracy, . . . to terminate Hawaiian Oke as their respective distributor. For the purpose of returning a verdict, however, you will consider these divisions as being the defendant, The House of Seagram, Inc.

. . . if you should find, . . . that there has been a conspiracy among two of those three entities, for example, and no one else, you could return a verdict, but since they are within the parent corporation you would have to return it against The House of Seagram, Inc.

. . . .

Touching again on this, if you should find that any two or more of these three sales entities did enter into a conspiracy, as I have defined that term to you, to terminate Hawaiian Oke's distributorships, then any conspiracy which you might find one or more of these sales entities entered into would be chargeable for the purposes of assessing damages, if any are found, against The House of Seagram, Inc.

Defendant Seagram objected (Tr. VIII: 3163):

Mr. Anthony: We note our objection to the giving of court's Instruction No. 2 . . . on the grounds . . . that it stands for the proposition that a corporation may conspire with itself, which as I read it is not the law.

. . . .

> The Court: The Court will give over objection the Court's Instruction No. 2 as modified.

Seagram also objected to Instruction No. 6 relating to the intracorporate conspiracy question (Tr. VIII: 3139-3140):

> The Court: Court's Instruction No. 6.
>
> Mr. Anthony: . . . I object to the unincorporated divisions (part) of the instruction.
>
> . . . .
>
> Mr. Anthony: . . . (N)or can there be any verdict against The House of Seagram alone. There has got to be three of these defendants, all three, in any money verdict in this case. I mean The House of Seagram, Barton, Barton Western and McKesson.

Further grounds of objection were urged below (Tr. VII: 2745-2757) to the ruling on unincorporated divisions conspiring among themselves, were overruled (Tr. VII: 2762-2777) and defendants objected (Tr. VII: 2777-2782).

Objection was also taken to the form of verdict which permitted the jury to return a verdict against The House of Seagram, Inc. alone. (Tr. VIII: 3228.)

ERROR NO. 7

The court erred in charging the jury in court's Instruction No. 6 that Joseph E. Seagram, Inc. (parent of The House of Seagram, Inc.) could not lawfully direct the unincorporated divisions of The House of

Seagram, Inc. to change distributors. This is set forth in Error No. 5, *supra*. Objection was as follows (Tr. VIII: 3139-3140):

> The Court: Court's Instruction No. 6.
>
> Mr. Anthony: The second paragraph on page 2 ought to come out. That is just confusing in this case. There is no evidence of Joseph E. Seagram in that, and what Mr. Blecher ought to do is dismiss without prejudice and he can do that without the slightest harm to his case now or on appeal or on a retrial or at any time, because this is just going to make more and more confusion. . . .
>
> . . . .
>
> Mr. Anthony: . . . (T)here can be no verdict against Joseph E., nor can there be any verdict against the House of Seagram alone. . . .

Instruction No. 2 allowed a finding of conspiracy between the parent corporation and its divisions (Tr. VIII: 3163):

> Mr. Anthony: We note our objections to the court's Instruction No. 2 first on the grounds that it erroneously includes Joseph E. Seagram . . .

Objection was also taken to the alternate form of verdict that would have permitted the jury to find a conspiracy among the Seagram corporations and divisions alone (Tr. VIII: 3228):

> Mr. Anthony: I object to the giving of Alternate No. 4, in which the court would permit the jury to return a verdict against Joseph E. Seagram and Sons, Inc., and the House of Seagram.

ERROR NO. 8

The court erred in giving the following instruction on parallel behavior (Tr. VIII: 3202):

> Mere similarity of conduct among various persons, and the fact that they have associated with each other, and may have assembled together and discussed common aims and interests, does not necessarily establish proof of the existence of a conspiracy.
>
> To repeat that a little differently, while parallel behavior is admissible circumstantial evidence from which you may infer agreement, nevertheless proof of parallel behavior does not of itself necessarily establish an agreement.

It also erred in refusing the following Barton's Instruction No. 9:

> The fact alone that two or more defendants dealt with plaintiff in a substantially similar manner (at or about the same time) does not support an inference of conspiracy even though each defendant may have known that the business behavior of the other was similar to its own. Similarity of operation does not prove a conspiracy unless there are circumstances which logically suggest joint agreement as distinguished from individual action. (R. 222.)

The grounds of objection to giving the court's modification of proposed Instruction B-9 and to refusing to give proposed Instructions B-9, S-5 or S-11 as submitted are set forth at Tr. VIII: 2994-3011. Defendants urged that their proposed instructions correctly

stated the law and that the court's charge which permitted the jury to infer conspiracy from mere parallel conduct alone was erroneous.

The court also erred in refusing Seagram's Instructions Nos. 5 and 11, which read as follows:

> You are instructed that each of the defendants had every right to select the distributor in Hawaii of its products and the right to change distributorships in accordance with the terms of the contract with plaintiff. If you find that the defendant Seagram did not renew its distributorships with plaintiff in accordance with the terms of its contract for business reasons satisfactory to it and not as a result of any combination or conspiracy with the other defendants, such action is perfectly lawful even though others followed a similar course. (S-5, R. 231.)
>
> The crucial question is whether defendants' conduct toward plaintiff stems from independent decision or from an agreement, tacit or express. To be sure business behavior is admissible circumstantial evidence from which the fact finder may infer agreement by persons of parallel business behavior, but this does not conclusively establish agreement or constitute a Sherman Act offense. (S-11, R. 357.)

ERROR NO. 9

The court erred in admitting Exhibits P-2, P-3, P-4 and P-5 and in permitting them to be explained by the witness while at the same time refusing to permit cross-examination of the witness on their relevance.

1. The Evidence and the Objections

Plaintiff called a CPA as a witness (Tr. III: 1072-1073):

> Mr. Blecher: . . . (T)his witness . . . will not in any sense be giving us 'expert testimony'. . . .
>
> The Court: Is my understanding correct, that he is offered as an expert in computation?
>
> Mr. Blecher: That is correct.

Caldwell testified that he had no familiarity with the liquor industry (Tr. III: 1073) but was told by Mr. Blecher that there were no extraneous factors that would affect the charts (Tr. III: 1093-1094). The exhibit was received over objection that it was speculative, without foundation and irrelevant. (Tr. III: 1095, 1104.)

Exhibit P-3, a chart representing plaintiff's projected profits for the years 1965-1969, was received over objection that it was speculative. (Tr. III: 1109.)

After Caldwell admitted he had not taken into account the actual 1966 experience in the liquor industry in Hawaii, the objections were renewed. (Tr. III: 1121.)

Defendants pointed out instances in which the assumptions in the charts contradicted admitted facts. (Tr. III: 1121-1125.) These objections were overruled. (Tr. III: 1129.)

Exhibit P-4, a profit projection for plaintiff based on the earnings of McKesson, was received over objection that no basis of comparison was shown. (Tr. III: 1130, 1136.)

Caldwell admitted he had made no analysis of the operations of McKesson as compared with those of Hawaiian Oke. (Tr. III: 1139.) The following occurred (Tr. III: 1139-1141):

> Q. Do you think that it is good accounting principle to apply the profit of one wholesaler to the sales of another wholesaler to determine the profit of the second wholesaler without making such a comparison?
>
> Mr. Blecher: I object to this question on the ground that it calls for an opinion and conclusion. There is nothing in this exhibit to indicate that the witness . . . did other than what I asked him to do. . . .
>
> . . . .
>
> Mr. Blecher: . . . the witness has made it clear that he has done nothing but a mathematical computation of certain things which I developed as a matter of legal theory. . . . And for them to inquire about sound accounting principles outside the area about which he testified, they are trying to cross-examine as though he is vouching for these that he is an expert.
>
> . . . .
>
> Mr. Anderson: . . . Furthermore, Mr. Blecher said that this man is not an expert. From what Mr. Blecher is saying, as I understand, this is merely a dummy Mr. Blecher. I don't like the word, but basically that is what it is. He says it is his evidence.
>
> Mr. Blecher: That is basically correct.
>
> Mr. Anderson: Then it is Mr. Blecher's argument to the jury, but it is not evidence unless this man is an expert.

At first the court refused to admit Exhibit P-4 (Tr. III: 1145), but later reversed his ruling. (Tr. VII: 2679.)

Plaintiff offered Exhibit P-5, a chart applying earnings multiples to the average projected profit. The court reserved decision, and a further objection was raised (Tr. III: 1147):

> Mr. Anthony: There is one other item. I believe to have a price earnings ratio you should have an expert in that field to give his opinion on this, rather than Mr. Blecher telling the witness on the stand to make out a memorandum. This is an additional ground to the objection.

Caldwell admitted that he simply followed Mr. Blecher's instructions in preparing Exhibits 2, 3, 4 and 5. The following then occurred (Tr. III: 1152):

> Q. . . . Would you have wished to investigate audit statements if you were investigating this company for the prospective purchaser?
>
> Mr. Blecher: I object to the question as exceeding the scope of direct examination.

The objection was sustained.

. . . .

> Q. In order to come to a conclusion concerning the value of a corporation, isn't it good accounting principle to examine the books and records of a corporation in order to be of some assistance to a purchaser who respects your advice as an accountant?
>
> Mr. Blecher: I object to the question on the grounds that the witness has not been established . . . as an expert in this area.

> The Court: That is in the area of——
>
> Mr. Blecher: Of corporate acquisitions, mergers, other than as an expert accountant. And this was the testimony and there was no testimony on direct or cross-examination with very minor exceptions.

The objection was sustained. (Tr. III: 1155.)

Defendants attempted to cross-examine the witness as to factors not considered by him in preparing the charts. (Tr. III: 1189-1190.) This was objected to and sustained.

Defendants renewed their objections to Exhibits P-4 and P-5 and moved to strike Exhibits P-2 and P-3. (Tr. VII: 2675-2678.)

The court admitted Exhibits 4 and 5 and denied the motions to strike Exhibits 2 and 3. (Tr. VII: 2679.)

2. Grounds of Error

a. The projections were not evidence, but merely arguments of counsel presented through a dummy witness.

b. Caldwell was not qualified as an expert.

c. The exhibits were irrelevant to the issue, which was the market value of plaintiff's business.

d. The exhibits were speculative and based on assumptions not warranted by the evidence.

e. Several assumptions in the exhibits were unexplained.

f. No foundation was laid to establish the comparability of McKesson and plaintiff.

ERROR NO. 10

The court erred in admitting testimony of abstract expressions of interest by third parties in acquiring plaintiff's business.

1. The Evidence and the Objections

On direct examination Ted Wong related conversations he had had with third persons regarding the prospective sale of the corporation. Defendants objected as hearsay and irrelevant. (Tr. I: 207-209.)

Wong was permitted to testify to conversations he had had with individuals in which they had expressed interest in purchasing Hawaiian Oke or a portion of the company's stock. (Tr. I: 211-218.) In no case was there an offer to buy, and in no cases was there any mention of price.

In the course of Wong's testimony, plaintiff offered Exhibit P-54, a letter from one George Thornally to one C. T. Wong of the Liberty Bank in Honolulu, expressing Thornally's interest in plaintiff and requesting Wong to advise him if the company were for sale. Objection was made to the introduction of the letter and any testimony concerning it (Tr. I: 212-214):

> Mr. Anthony: May I add a ground that this has no relevance to this lawsuit at all?

The Court: The objection is overruled.

Mr. Blecher: We offer Exhibit 54 into evidence, your Honor.

The Court: The same objection?

Mr. Anthony: Yes, your Honor.

The Court: By all counsel? The objection is overruled.

. . . .

2. Grounds of Error

a. The evidence was irrelevant.

b. The evidence was hearsay.

ERROR NO. 11

The court erred in admitting evidence of alleged out-of-pocket losses.

Exhibit P-6 lists plaintiff's annual profits and losses from 1959 through 1966. It was admitted over objection that no foundation was laid and was speculative and was presented as an argument of counsel through a CPA as his dummy and was not expert testimony. (Tr. III: 1149-1150.)

ERROR NO. 12

The court erred in instructing the jury that it could consider the question of plaintiff's possible future profits and in refusing to instruct that plaintiff was making no claim for such profits. The court instructed as follows (Tr. VIII: 3216-3217):

> As I said, if, and only if, but if you find that the plaintiff is entitled to some damages, then I instruct you that it is proper, under the antitrust laws, for the plaintiff to recover the difference, if any, between the value of its business at the time of the injury, and the amount of money and property which the stockholders actually received as a result of the liquidation which, plaintiff asserts, was forced upon it by the termination of Calvert, Four Roses, Frankfort and Barton. In considering the amount of this difference, if any, in this respect you should also look to all of the facts and circumstances in the record on this subject, including all of the testimony and exhibits. You may consider the past profits or losses of the plaintiff, the evidence which bears on the question of future profits or losses; you may consider the trend of the plaintiff's business, whether it was improving or deteriorating; you may consider all of the evidence relating to the interest of third persons in purchasing the plaintiff's business and, in fact, as to whether there was a market for the plaintiff's business at all.

Defendants had offered Instruction M-C, which the court refused (Tr. VIII: 3122-3123):

> You are instructed that although plaintiff in this case claims damage to itself as the result of the alleged conspiracy, plaintiff is not claiming as a measure of damages the difference between any profit it may have made before and after the alleged conspiracy. (R. 362.)

Defendants objected to any instruction which would have permitted the jury to award a verdict based on

lost profits or which did not clearly inform the jury that no such claim was being made. (Tr. V: 2822, 2854; VIII: 2963, 3227.)

ERROR NO. 13

The court erred in instructing the jury that they could take into account the expressions of interest of third persons in acquiring plaintiff's business for the purposes of arriving at the amount of damages. The instruction appears at Tr. VIII: 3216-3217 and is set forth in full in Error No. 12 *(supra)*.

Objection was made at Tr. VIII: 2963-2964. Defendants had previously objected that such evidence was irrelevant to any issue in the case. (See Error No. 10, *supra)*.

ERROR NO 14

The court erred in instructing the jury that they could take into account plaintiff's alleged out-of-pocket losses in arriving at the amount of damages. The jury was instructed (Tr. VIII: 3217):

> Moreover, plaintiff may also recover, under the law, for out-of-pocket operating losses occasioned as a result of any of defendant's conduct. This, you may consider the out-of-pocket losses alleged by plaintiff to have been occasioned in 1965 and 1966 as a result of the liquidation of its business.

Defendants objected that there was no proof of any out-of-pocket losses caused by any act of defendants

and that the amounts appearing in Exhibit P-6 were without foundation. (Tr. VIII: 2934-2935; 2960.)

ERROR NO. 15

The court erred in instructing the jury that it could treat the Caldwell testimony and exhibits as though it were expert testimony and in refusing to instruct the jury that his exhibits were simply representations of counsel's arguments.

The court instructed the jury as follows (Tr. VIII: 3192-3194):

> The rules of evidence ordinarily do not permit witnesses to testify as to opinions or conclusions. An exception to this rule exists as to those whom we call "expert witnesses." Witnesses who, by education and experience, have become expert in some art, science, profession, or calling, may state an opinion as to relevant and material matter, in which they profess to be expert, and may also state their reasons for the opinion.
>
> For example, there was reference by Counsel, as you remember, to Vasquez, who was presented as an expert economic analyst in the field of the liquor industry. Also, you had another expert of a different nature, Mr. Caldwell, who is a C.P.A., an expert in accounting. There may have been others, maybe someone who is an expert in advertising. I won't say there was but it may be that you recall some other expert who testified.
>
> But you should consider each expert opinion received in evidence in this case, and give it such

> weight as you may think it deserves. If you should decide that the opinion of an expert witness is not based upon sufficient education and experience, or if you should conclude that the reasons given in support of the opinion are not sound, you may reject the opinion entirely. Or you may accept it if you think it is sound.
>
> The testimony of an accountant,—and I think we had two or three accountants here—and any charts or graphs prepared by him and admitted in evidence, were received for the purpose of explanation of the facts disclosed by the books and records and other documents which are in evidence in the case. However, such charts or summaries are not in and of themselves evidence or proof of any facts. If such charts or summaries do not correctly reflect facts or figures shown by the evidence in the case, the jury should disregard them.
>
> In other words, such charts or summaries are used only as a matter of convenience; so if, and to the extent that, you find they are not in truth summaries of facts or figures shown by the evidence in the case, you are to disregard them entirely.

The court, however, refused to give Barton's proposed Instruction No. 51 (Tr. VIII: 3031-3032):

> Mr. Grant Caldwell, the certified public accountant from Salt Lake City, Utah, was presented by plaintiff, Hawaiian Oke, simply to make certain schedules, charts and graphs as an accountant pursuant to instructions from Mr. Blecher, plaintiff's attorney, using certain financial statements of Hawaiian Oke and certain as-

> sumptions of fact given him by Mr. Blecher. Mr. Caldwell did not claim to be an expert in the liquor industry or any phase of the liquor business and was not presented as such an expert witness by plaintiff.
>
> On the other hand, Dean Stephen Vasquez was presented by defendant, McKesson & Robbins, as an expert in the liquor industry and testified as such an expert witness. (R. 359.)

Defendants urged that an instruction such as B-51 was necessary to clarify for the jury the fact that Caldwell was presented as the alter ego of plaintiff's counsel and was not to be considered in the same light as an expert. (Tr. VIII: 3032.)

ERROR NO. 16

The court erred in refusing to instruct the jury to disregard the rental income from the leasehold that had been transferred out of the corporation. One instruction offered was Barton's proposed Instruction No. 50:

> The evidence is clear that the Bishop Estate leasehold was transferred by Hawaiian Oke to Mrs. Thelma Wong in June 1963 to hold as trustee for the stockholders of Hawaiian Oke and she has been managing it and collecting the rentals from it for them. Therefore, even if you should find that there was a conspiracy among the defendants or certain of them as alleged by plaintiff, in determining what damages, if any, was suffered by plaintiff as a proximate result

> of such conspiracy, you may not include the value of such leasehold or any rentals past or future produced from the leasehold since nothing the defendants did deprived the plaintiff of the leasehold or any of the rentals from it. (R. 358.)

Another instruction offered on this point was McKesson's proposed Instruction No. 11:

> The evidence in this case establishes that in June, 1963, the plaintiff corporation assigned to Thelma Wong as trustee for stockholders of Hawaiian Oke and Liquors, Ltd. the Bishop Estate leasehold on the premises at which plaintiff conducted its business, and that the plaintiff corporation was never thereafter the owner of that lease. Accordingly, all retail income derived after June, 1963 from subleases of the business premises of plaintiff corporation was income to Thelma Wong as Trustee for stockholders and was not income to the plaintiff corporation.
>
> If you should find that a conspiracy existed in this case in violation of Section 1 of the Sherman Act, and only in that event you will be obliged to determine what damages are due to plaintiff. If you therefore reach the damage issue of this case, you are instructed that you may not consider any rental income derived from subleases at the plaintiff's business premises after June, 1963 as income to the plaintiff corporation. (R. 361.)

Defendants urged that since the evidence was uncontradicted that the leasehold had been transferred from plaintiff to Thelma Wong, the income there-

from after the transfer was not properly includable in determining the fair market value of plaintiff corporation in 1965. (Tr. VIII: 3026-3031, 3113-3114.) Both instructions were refused. (Tr. VIII: 3031, 3114.)

ERROR NO. 17

The court erred in refusing to instruct the jury that a business is not necessarily worth more while operating than after it has shut down. The instruction refused was Barton's proposed Instruction 52:

> You are not to assume that a business must be worth more while it is operating than it is after it stops operating. This may or may not be true. (R. 360.)

The instruction was offered to modify plaintiff's Instruction 37, the substance of which was given by the court (see Error No. 14, *supra*). That instruction listed the factors which the jury could consider in arriving at the amount of damages. The instruction was offered (Tr. VIII: 3033-3034) and refused (Tr. VIII: 3035).

No. 22,162

IN THE

United States Court of Appeals
For the Ninth Circuit

Joseph E. Seagram and Sons, Inc., The House of Seagram, Inc., McKesson and Robbins Incorporated, Barton Distilling Company and Barton Western Distilling Co.,

Appellants,

vs.

Hawaiian Oke and Liquors, Ltd.,

Appellee.

On Appeal from the United States District Court for the District of Hawaii

APPELLEE'S BRIEF

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Subject Index

Table of Authorities Cited

Cases

Statutes

Texts

No. 22,162

IN THE

United States Court of Appeals

For the Ninth Circuit

JOSEPH E. SEAGRAM AND SONS, INC., THE HOUSE OF SEAGRAM, INC., MCKESSON AND ROBBINS INCORPORATED, BARTON DISTILLING COMPANY and BARTON WESTERN DISTILLING CO.,

Appellants,

vs.

HAWAIIAN OKE AND LIQUORS, LTD.,

Appellee.

On Appeal from the United States District Court for the District of Hawaii

APPELLEE'S BRIEF

I

PRELIMINARY STATEMENT

This is an appeal pursuant to 28 U.S.C. §1291 from the judgment of the District Court for the District of Hawaii entered on June 2, 1967 (R. 307) in favor of appellee based upon a jury verdict of $65,000 which after trebling and allowances for attorneys' fees and costs was $246,-

938.34. (R. 307.) Appellants have appealed from that judgment based upon the trial court's denial of their motions for (1) a directed verdict (R. 279-282) and (2) judgment *n.o.v.* and/or new trial (R. 300-302). These motions were, in turn, made upon appellants' assertions of insufficiency of evidence, errors in the admission and rejection of evidence and errors in the instructions to the jury, as more specifically set forth and answered herein.

II

STATEMENT OF THE CASE

A. The Parties and the Industry.

Appellee Hawaiian Oke & Liquors, Ltd. (Hawaiian Oke) brought this action to recover treble damages under Section 4 of the Clayton Act (Title 15 U.S.C. §15) for injury resulting from appellants' violations of the antitrust laws. Hawaiian Oke contended it was damaged by a "combination . . . or conspiracy, . . ." which eliminated it from the wholesale liquor distribution business in Hawaii. The alleged participants in the combination were:

Joseph E. Seagram & Sons, Inc. (Jos. E. Seagram);
Calvert Distillers Company (Calvert), a division of House of Seagram, Inc. (House of Seagram);
Four Roses Distillers Company (Four Roses), a division of House of Seagram;
Frankfort Distillers Company (Frankfort), a division of House of Seagram;
McKesson & Robbins, Inc. (McKesson);
Barton Distilling Company (Barton); and
Barton Western Distilling Co. (Barton Western), a wholly-owned subsidiary of Barton.

Joseph E. Seagram & Sons, Inc. is the parent (manufacturing) company of its wholly owned marketing subsidiary, House of Seagram, Inc. The President of Joseph E. Seagram is Edgar Bronfman; Jack Yogman is his Executive Vice-President. The House of Seagram is divided into six (6) unincorporated divisions which are suppliers of various types and brands of liquor products. (Exh. S-17.)

The evidence established that each of the above divisions were "autonomous"; that each was referred to as a "company". Edgar Bronfman testified that each division had its own chief executive and that these men operated autonomously. (Tr. 948-49.) Furthermore, he stated that the marketing of products was left "autonomously" to the various divisions. (Tr. 961.) Arthur Murphy (President of Calvert) testified that each division had a separate responsibility to market and advertise its own products. (Tr. 2646.) Each has separate officers and its own chain of command. (Tr. 2647.)

Yogman testified that the various divisions are self-contained competing units which fight each other as hard as they fight other (*i.e.*, non-Seagram affiliated) competitors. (Tr. 971.) As Murphy stated, each division competes in selling through various distributors. (Tr. 2647.) It is also important to note that normally each division makes an individual and independent decision as to whom its distributors will be. (Tr. 2648.) Moreover, each division makes its own independent pricing decisions. (Tr. 2648.) In short, as R. Flint (Executive Vice-President of Frankfort) testified, referring to other House of Seagram divisions, "They run their business and we run ours." (Tr. 1577.)

The House of Seagram, through its divisions, sells various types of liquor products—straights and blends, vodka, gin and rum to distributors who resell to retail package stores, bars and others. The evidence in this case showed that there were, during the time involved, approximately seven major distributors of liquor products in the State of Hawaii. (Tr. 2367-68.) Of these, the largest was appellant McKesson, a national company having liquor distributorships in major cities throughout the United States, many of which handle products of Seagram divisions and/or Barton. (Tr. 326-27.) In Hawaii, McKesson was a competitor of the appellee Hawaiian Oke, which was, itself, one of the major distributors of liquor products in that State.

Hawaiian Oke was, *inter alia,* the wholesale liquor distributor, in the Hawaiian Islands, for the products of Calvert, Four Roses, Frankfort, Barton and Barton Western.[1] The lines of these various distillers accounted for a significant portion of Hawaiian Oke's total sales in 1964-65. (Exhibits P-106 through P-114.)

B. The Combination and Conspiracy.

1. The Genesis of the "Plan".

On June 3, 1965, there was a meeting in Calvert's New York City offices, followed by a luncheon meeting at a nearby restaurant. In attendance at these meetings were

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[1]The appellee was the exclusive distributor, in Hawaii, for Calvert products from January, 1963 to August, 1965 (Tr. 447, 454-455); for certain Four Roses products from the mid 1930's to August, 1965 (Tr. 1062; Exh. P-110); for certain Frankfort products from 1961 to August, 1965 (Tr. 1558); and for Barton and/or Barton Western products from 1961 to August, 1965 (Tr. 1071; Exh. P-113).

Jack Yogman, an executive vice president of Joseph E. Seagram & Sons, Inc.; Arthur Murphy, President, and Al Fleischman, National Sales Manager of Calvert; Joseph Cotler, Vice President; James J. Maloney, Western District Manager, and Abe Kauhane, Hawaii Division Manager of McKesson. (Tr. 342-44, 664-674, 2375-2380, 2638-2640.)

Yogman testified that it was at the June 3 meeting that he first became aware of "specific talk of a plan" that McKesson might open a second distribution house in Hawaii. (Tr. 976.) *McKesson had never before undertaken to open a new second house.* (Tr. 622-3.)[2]

Maloney (McKesson) testified that the idea of a second house "was probably a mutual agreement" between the McKesson, Calvert and Jos. E. Seagram representatives at the June 3 meeting. (Tr. 669.) However, on July 7, 1965, Maloney wrote (to Cotler) ". . . that we [McKesson] should start putting the pressure on Jack Yogman, if not Edgar Bronfman [President, Jos. E. Seagram & Sons], who actually asked us to get into this deal." (Exh. P-72; Tr. 728.)

2. The Desirability of a Second House and the Need for Additional Lines.

Cotler (McKesson) testified that Murphy (Calvert) initiated the idea of a second house. (Tr. 343-344.) The creation of a second house was deemed necessary because McKesson was already distributing "7-Crown" and

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[2]McKesson had dual houses in Miami but only because it had acquired a second house which was already in existence. (Tr. 325-335.)

"V.O." for the Seagram Company (another division of the House of Seagram). (Tr. 669.) Seagram is McKesson's chief supplier in Hawaii (Tr. 1491) and "7-Crown" is the leading selling blended whiskey in the state. (Tr. 2397.) Calvert, then, would be understandably reluctant to have its line—which directly competes with "7-Crown" and "V.O."—distributed by the same wholesaler. As Murphy testified, he wanted Calvert in a house where it would be a "primary brand". (Tr. 1441.) Murphy ". . . wouldn't have made the move unless a separate sales organization was created by the McKesson people". (Tr. 1441.) McKesson likewise preferred to have separate houses for the distribution of these competing lines. (Tr. 669.)

Had this been all that transpired, the present case would never have arisen. However, it was at this point that, appellee contends, the anti-competitive combination began to take shape.

At the June 3 luncheon meeting, McKesson told Seagram and Calvert representatives that if a second house was to be created it would be necessary for that house to have additional lines, an economic fact well known to all of them. (Tr. 2595; 2667-8.) Calvert alone would not be enough to support the new house. (Tr. 671.) Indeed, Maloney (McKesson) felt that the Calvert line was somewhat of a gamble, "an unknown quantity". (Tr. 734.) It was his opinion that McKesson was doing Seagram a favor—". . . taking problems off their hands . . ." (Exh. P-72; Tr. 733)—by taking on the Calvert line. At the June 3rd luncheon meeting, Maloney specifically asked Yogman (Jos. E. Seagram & Sons) to help McKesson get

the other House of Seagram lines for the new house. (Tr. 732-3.)

In this light, when we reconsider Maloney's July 7 memo asking Cotler to "start putting the pressure" on Yogman ". . . who actually asked us to get into the deal" (Exh. P-72), it is reasonable to infer, appellee contends, that Yogman and/or other Seagram representatives agreed to help McKesson secure other lines for the second house.

Yogman (Tr. 976) and Fleischman (Tr. 2595) testified of their awareness of the second house's need for additional lines. Murphy, President of Calvert, was not only aware of this need but was "concerned" about it. (Tr. 2667-8.) He knew that without additional lines a second McKesson house, distributing his line, would never come about; therefore, even at this early date, the Four Roses line was mentioned as one possible additional line for the new house. (Tr. 2667-8.) Thus, the beginning of a horizontal combination among suppliers was taking shape. One supplier (Calvert) and the parent company (Joseph E. Seagram & Sons) had realized the need for joint action between various suppliers, and were already considering combining for such joint action with another supplier, Four Roses.

3. McKesson's Role in Organizing and Promoting the Concerted Termination (Group Boycott) of Hawaiian Oke.

After the luncheon meeting with the Seagram and Calvert representatives, the McKesson officials adjourned to Cotler's office for an internal meeting. McKesson knew that the loss of Calvert would hurt Hawaiian Oke. (Tr. 2446.) At this time Cotler, Maloney and Kauhane dis-

cussed the feasibility of opening the second house and talked of having the Barton, Four Roses and Frankfort lines, as well as Calvert. (Tr. 342-49.) Significantly, *all of the lines then discussed were distributed by appellee, Hawaiian Oke.* This evidences the early stages of a plan by McKesson to have various suppliers join in terminating business dealings with Hawaiian Oke.

Shortly thereafter, on June 7, 1965, Kauhane sent a memo to Maloney specifying the lines which the McKesson executives had discussed and ". . . decided to include under . . ." the new house. (Exh. P-71; Tr. 687.) The brand names right at the top of the list—and the two which would be expected to produce a major portion of the new house's case sales volume—were Calvert and Barton. Also mentioned were Frankfort and Old Mr. Boston. The thrust of the June 7 memo was that the second house would survive by distributing a combination of some lines which were already committed to McKesson's primary house and those lines distributed by Hawaiian Oke. (Tr. 687-693.) The tenor of that June 7 memo again evidences an intent on the part of the McKesson organization to prey upon the sources of supply of Hawaiian Oke. There is no indication that McKesson was seeking new business on a general basis, in open competition, from any of the other major liquor distributors in Hawaii. Instead, after the meeting with the Calvert and Jos. E. Seagram officials, McKesson directed its efforts in a secretive, *sub rosa* attack on appellee's sources of supply (Tr. 777.) This is even more clearly demonstrated by the last numbered paragraph of the aforementioned June 7 memo (Exh. P-71), where Kauhane (McKesson) asks:

> "(a) When will Hawaiian Oke be told of their loss of lines? . . .
>
> "(c) If we bought Hawaiian Oke, what would Seagram say about Old Mr. Boston?" (Tr. 688.)

The entire arrangement, including the prospect of eliminating appellee as a competitor, was a desirable one to McKesson for many reasons. Calvert was preparing to market a new Hawaiian Rum (Leilani). Appellee, as Calvert's distributor, would have been given the Leilani line. (Tr. 1641.) With the projected increase in tourism in Hawaii, and the popularity of rum drinks there, McKesson officials realized that this new rum line would be a profitable item. (Tr. 345-6.) Moreover, Kauhane (McKesson) was most happy at the prospect of taking on the Calvert line because more lines and more volume would mean "more money" for McKesson. (Tr. 2377.)

Perhaps one of McKesson's strongest motives was its desire to control the lower priced Barton line, which had grown substantially since Hawaiian Oke had taken it over from McKesson several years earlier. (Tr. 1071; Exh. P-113, P-114.) McKesson was interested in distributing a low price whiskey in Hawaii (Tr. 1513-15; Exh. P-73), and was especially attracted to the Barton and Old Mr. Boston lines which appellee was distributing. (Exh. P-71; P-74; Tr. 1514-1517.) In April 1965, Maloney suggested that E. S. Chang (then McKesson's assistant sales manager in Hawaii) contact Barton Distilling Co. regarding a lower priced whiskey. (Tr. 1516-17; Exh. P-74.) And Chang communicated with Sheldon Friedman (Barton's Western Division Manager). (Tr. 1518.) Of course, at

that time, Barton's distributor in Hawaii was the appellee. But a month later, in early June, McKesson was still thinking of taking the Barton line from Hawaiian Oke. (Tr. 342-49.) And, appellee contends, with the idea of a new house, and the opportunity which it presented for putting together a planned horizontal combination of various suppliers refusing to deal further with Hawaiian Oke, McKesson saw the opportunity to make Barton a part of this plan. McKesson was most successful—as is evidenced by the developments which followed: Barton did join the plan with Calvert, Four Roses and Frankfort to terminate Hawaiian Oke. (Tr. 157, 160, 165); Hawaiian Oke was so shattered by this massive loss that it was eliminated as a distributor of liquor in Hawaii; Barton did become extremely important to McKesson's second house—sales of Barton products have accounted for nearly one-half of the new house's total income (Tr. 1079-92; Exh. P-17); and in 1966, sales of all of Hawaiian Oke's former suppliers accounted for 87.4% of the new house's total case depletions of liquor. (Tr. 1088; Exh. P-17B.)

4. The Mechanics of the Conspiracy: The Need for and Existence of Concerted Action by the Appellants.

The facts detailed above establish that both McKesson and Calvert were anxious to see the second house become a reality. But both knew that this could never come about unless other lines joined Calvert in the new house. McKesson was especially desirous of controlling the Barton line and securing it as a major supplier for its second house. Also, the jury could reasonably have found that Yogman and Murphy set out to recruit other Divisions of the House of Seagram into the fold of the new house.

Indeed, in light of the mutual recognition of the need for additional lines, and the specific mention, at an early date, of Barton, Calvert, Four Roses and Frankfort, appellee contends that the jury could have inferred that McKesson would open its second house only if these particular lines would agree to jointly terminate Hawaiian Oke in favor of the new house.

There was clear evidence of discussions between the various heads of the three Seagram Divisions involved. The top executives of these Divisions officed only steps apart in the same Park Avenue building in New York City. (Tr. 980.) Also, the Western Division managers of Calvert, Four Roses and Frankfort officed in the same Los Angeles building, 3540 Wilshire Boulevard. (Tr. 1265.) Edgar Bronfman, President of Jos. E. Seagram, testified that he could not say that these Division executives did not discuss a mutual plan to terminate Hawaiian Oke. (Tr. 968-969.) Indeed, Maloney's memo to Cotler requesting that he "start putting pressure" on Yogman and Bronfman pursuant to some "deal" which they instigated (Exh. P-72) could reasonably have led the jury to believe that the officials of Jos. E. Seagram as well as Murphy and Fleischman of Calvert had agreed to directly aid McKesson in securing additional Seagram lines.

J. Wishney (President of Four Roses) admitted conferring with Murphy after hearing of McKesson's second house proposal. (Tr. 1306-1309.) R. I. Flint (President of Frankfort) indicated to his Western Division Manager, J. Flick, that he had learned of the second house proposal through discussions with Murphy and Wishney. (Tr.

1582.) Significantly, there was no evidence that Flint had even talked to any of the McKesson people prior to his agreeing to terminate Hawaiian Oke in favor of the new McKesson house.

The fact that there were dealings and agreements in the Park Avenue office building is evidenced by Kaufman's (Four Roses) letter of June 30, 1965 to Kauhane (McKesson). (Exh. P-77.) Kaufman's allusion to "marriages . . . made in heaven. . . ." clearly meant that the decision to terminate Hawaiian Oke was made by the New York office. (Tr. 1451.) This decision by Four Roses was made only one month after it had sent an annual renewal contract to Hawaiian Oke. (Tr. 1444.)

Barton was an extremely important component in this concerted plan. In light of McKesson's interest in acquiring the lower priced Barton lines (dating back to April, 1965; contact with Barton in May, 1965; mention of Barton at the later June 3, 1965 meeting; and inclusion of Barton as one of the additional lines for the new house in the June 7, 1965 memo), the jury could have reasonably inferred that McKesson would not have gone forward with a second house unless it was assured of getting the Barton line. Moreover, the jury could well have found that Seagram was aware of this proposed combination from the tenor of Kauhane's (McKesson) June 7, 1965 memo regarding new lines: "Joe C. [Cotler] suggests to clear the whole matter with Seagram. . . ." (Exh. P-71.)

At the June 3, 1965 McKesson meeting, Cotler gave Maloney the responsibility of getting the Barton line, because Maloney regularly did business with Barton in

California. (Tr. 702-703.) In fact, McKesson was Barton's chief distributor in California. (Tr. 766.) Soon after Maloney returned to his San Francisco office from New York, he talked, by telephone, with Sheldon Friedman (Barton's Western Division Manager) in regard to the proposed second house. Maloney wanted the Barton line, and specifically inquired as to the possibility of Barton bottling a special lower priced whiskey for the new house. (Tr. 705-708; 766-768.) Friedman listened to the proposal, but made no decision, choosing to "wait and see developments." (Tr. 706-707.)

At this time, McKesson had not yet agreed to open the second house. (Tr. 770.) Maloney told Friedman that Calvert was willing to terminate Hawaiian Oke if McKesson opened a second house. (Tr. 770.) There was a conflict in Friedman's testimony as to his knowledge about Four Roses' and Frankfort's intentions to join Calvert in terminating Hawaiian Oke. In an earlier deposition, Friedman admitted knowledge that Four Roses, Frankfort and Calvert were considering termination of Hawaiian Oke; he denied this knowledge in court. (Tr. 774, *et seq.*) Hence the jury could have inferred that Maloney let it be known to Friedman that high officials in the Seagram organization were attempting to induce Four Roses and Frankfort to join Calvert in a concerted termination of the appellee.[3]

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[3]In *Girardi v. Gates Rubber Co.*, 325 F.2d 196, 203 (9th Cir. 1963) this Court stated that when a witness refuses to acknowledge a prior incriminating document, ". . . the jury, observing him and his manner of testifying and his interest could well disbelieve his testimony and believe that his written statement . . . was a true one."

Following his conversation with Maloney, Friedman discussed the McKesson proposal with his superior in Barton's Chicago office, Sidney Weinstock. (Tr. 768.) Approximately one week later, Weinstock flew into San Francisco, and on June 14 or 15 met with Friedman and Maloney. (Tr. 768-769.) Here it is important to note that Friedman and Weinstock were asked to keep the "second house" plan confidential, and they did not subsequently divulge the information to Hawaiian Oke even though it was admitted that they knew and realized that Hawaiian Oke's loss of the Calvert line would have an effect on the distribution of Barton's products in Hawaii. (Tr. 777.) This "secrecy agreement", then, could have been taken by the jury as further evidence of a conspiracy and of Barton's willingness to be a part of the plan for combined action to terminate the appellee.

It was only after this mid-June meeting that Maloney called Kauhane with a "go ahead" for McKesson's second house in Hawaii. (Tr. 2477.) The jury could have reasonably inferred that this mid-June meeting between Barton and McKesson officials culminated in Barton's agreement to join Calvert and other suppliers in the plan to terminate Hawaiian Oke. This, appellee contends, was the final development which McKesson desired, and needed; thus at this time McKesson made the decision to open the second house. (Tr. 675-76.) Although appellants contended that Barton's decision to terminate Hawaiian Oke was not made until July 7, the evidence is to the contrary. On June 29, Kauhane (McKesson) wrote Friedman (Barton):

"Dear Sheldon:

"Will you please advise me if you have informed Hawaiian Oke and Liquor Company about the break with them for the Barton line. If you have not informed them as yet, could you please advise me when you will".

(A carbon copy of this letter was sent to Maloney.) (Exh. P-88) Thus, the jury may have reasonably drawn the inference that after Maloney's mid-June meeting with the Barton people, Kauhane was informed that Barton had agreed to join the plan to enter the new house conditioned on anticipated similar action by Calvert, Four Roses and Frankfort. McKesson, then, had successfully extracted conditional agreements from four of Hawaiian Oke's suppliers that each would terminate appellee as a distributor if the other suppliers involved in the plan would do likewise.

C. The Termination of Appellee Was Pursuant to a Combination and Not the Result of Independent Business Decisions by the Appellant Suppliers.

As their principal "defense", appellants urged at trial that each of the four suppliers' (Calvert, Four Roses, Frankfort and Barton) termination of Hawaiian Oke was an independent decision based upon sound business judgment.[4] Each supplier's argument consisted of an assertion that Hawaiian Oke did a poor job as a distributor, and, in the case of Barton, it urged additionally that Hawaiian Oke was a poor credit risk.

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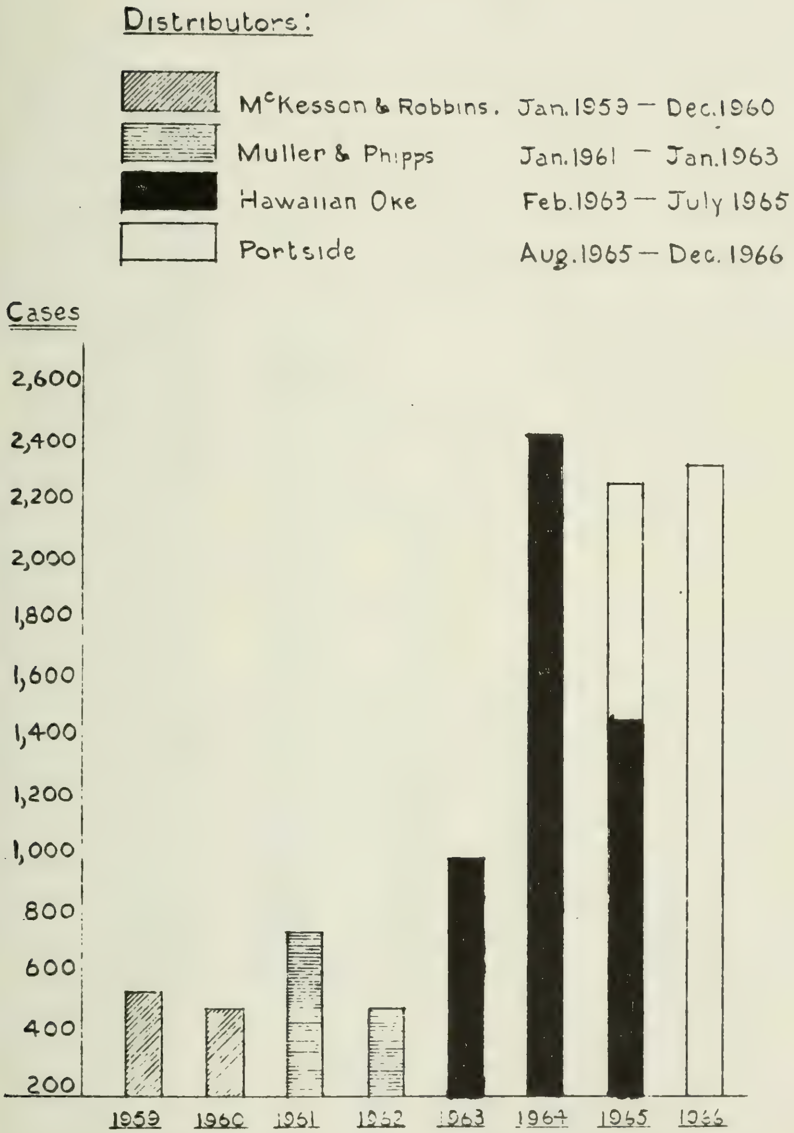
[4]This is not really an affirmative defense, it is a denial of the alleged combination.

There was a great deal of evidence received relating to these questions. Indeed, as the trial unfolded it became increasingly apparent that the critical issue to be determined by the jury was (as the court ultimately instructed) whether the termination of Hawaiian Oke was pursuant to a combination or the result of independent action based upon individual business judgment. The jury resolved the fact dispute in favor of appellee. That finding is amply supported by evidence on the basis of which the jury could have—and obviously did—reject the "independent business judgment" defense tendered to them.

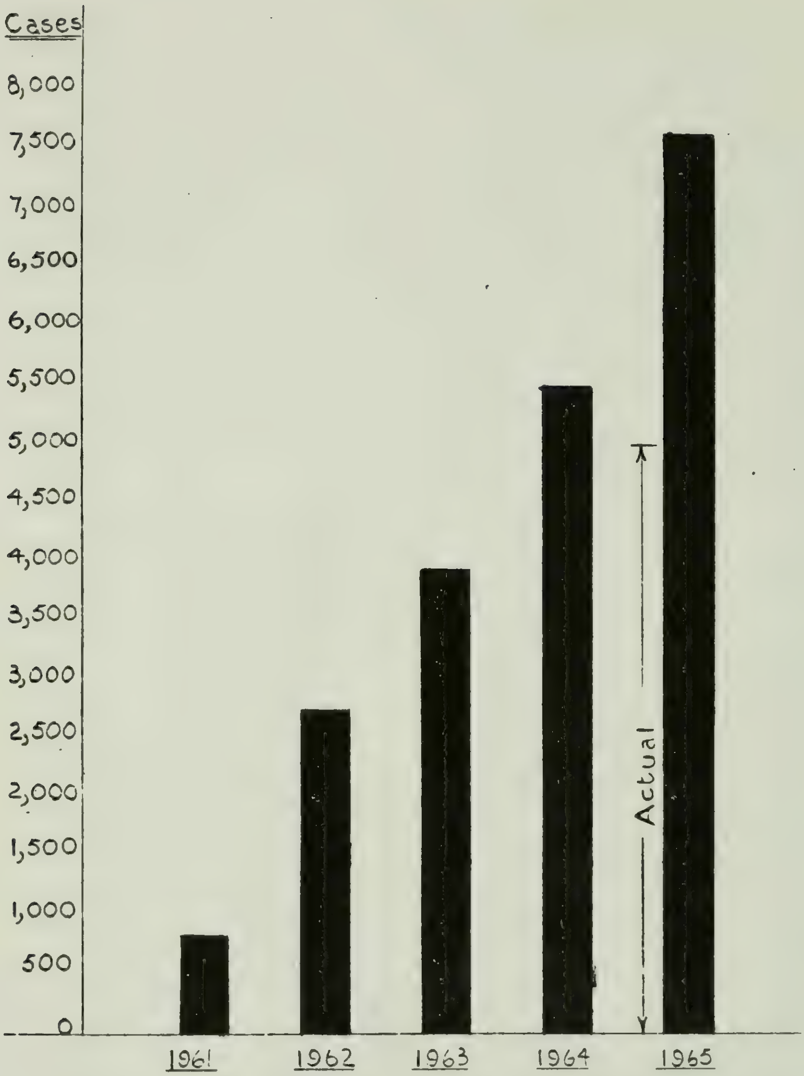
(a) Calvert.

Appellants offered evidence to show that Hawaiian Oke was not an effective distributor of Calvert products. Contrary evidence offered by appellee, however, provided a basis upon which the jury could easily have concluded that appellants' evidence regarding Calvert was essentially an "afterthought." For example, appellee demonstrated that its distribution of Calvert products from 1963 (when it took on the line) until July, 1965 (when it was terminated) was far superior to prior and subsequent distributors of Calvert. (See the chart, opposite page, Exh. P-109.)

Moreover, Arthur Murphy, President of Calvert, repeatedly complimented Ted Wong and the Hawaiian Oke organization for its sales performance with Calvert. (Exh. P-59 and P-65; Tr. 2660.) In June of 1964, Emilio Gonzales, then national sales manager for Calvert's Leilani Rum, had noted the significant improvement in the Hawaiian Oke operation and was satisfied that appellee was doing a good job for Calvert. (Tr. 1659.) Indeed, Gon-



Depletions — Calvert Extra
Calvert Reserve, Lord Calvert,
& Calvert Gin.
(Exhibit P-109)



Hawaiian Oke Depletions
Barton & Barton Western

(Note: Full Year 1965 is Projected
By Dividing Actual Depletions To Aug. 31st 1965
By Eight & Multiplying Result By Twelve.)

(Exhibit P—113)

zales indicated that appellee was to be the Hawaiian distributor for the new Leilani Hawaiian Rum line (Tr. 1651), which was expected to be a highly profitable item and which was extremely attractive to McKesson. (Tr. 345-346.) Moreover, Gerald Novak, Western Division Manager for Calvert, also expressed satisfaction with Hawaiian Oke's performance. (Tr. 1260.) As late as May 8, 1965, Novak again expressed approval in regard to Hawaiian Oke's distribution of Calvert products. (Tr. 2580; McKesson Exh. 39.)

The repeated commendation of appellee's performance—supported solidly by a statistical analysis of excellent sales performance, afforded the jury a more than ample basis upon which it could have rejected Calvert's "poor performance" contention.

(b) Barton.

The experience with Barton products also illustrated to the jury the lack of business reasons for the termination of Hawaiian Oke. (See chart, opposite page, Exh. P-113.)

In 1961 Hawaiian Oke depletions of Barton and Barton Western items totaled only 758 cases. By 1964, however, Hawaiian Oke's annual depletions of Barton and Barton Western products totaled 5,401 cases, an increase of nearly 700%. (Tr. 1071.) At trial, Barton argued that Hawaiian Oke's sales reflected an unusually large proportion of the less profitable "white goods" (gin, vodka, etc.). Yet the evidence reflected the fact that Barton had specifically requested Hawaiian Oke to increase its depletions of such white goods. (Exh. P-116.) Moreover, Hawaiian Oke's white goods ratio was not unduly high;

sales of the more profitable "brown goods" (whiskey, blends, *etc.*) were increasing both proportionately and in volume; and Hawaiian Oke's ratio of "brown goods"—"white goods" depletions was much better than either McKesson's pre-1961 performance or Portside's 1966 ratio. (Exh. P-19, P-116, P-117; Tr. 813-817, 1368.)

Barton also argued that a major reason for cancellation of Hawaiian Oke was the latter's delay in paying its bills. The jury may well have disbelieved this contention, however, in light of evidence introduced by appellee showing that Barton urged Hawaiian Oke to "load up" on merchandise because of an imminent increase in taxes. Barton indicated that a greater amount of time would be extended to Hawaiian Oke to pay for this unusually large purchase. (Exh. P-103, P-104.) Indeed, Mr. Ettlinger (Executive Vice President, Barton) couldn't deny that these solicited "tax scare" purchases were the basis for the alleged credit difficulties of Hawaiian Oke and admitted that all of these bills were paid during 1963. (Tr. 1373-1377.) (See also Tr. 888.) Moreover, Barton's contention that Hawaiian Oke had been deficient in meeting its obligations was in part based on its assertion that its credit terms, in many instances, extended for only sixty days. Yet it was shown that Hawaiian Oke had actually been extended ninety-day credit terms. (Exh. B-48.) Barton's Western Division Manager, Sheldon Friedman, admitted that from "the beginning of 1964 onwards" Hawaiian Oke's record of payments ". . . might have been improving." (Tr. 888.) Indeed, Friedman admitted that at the time of the termination he was happy with Hawaiian Oke. (Tr. 793.) Moreover, when asked by Ted Wong the reason for Barton's termination of Hawaiian Oke, Fried-

man conjectured that it was because of a possible "deal" between Barton and McKesson on "the West Coast" (Tr. 167-168), rather than for any economically sound business reason.

(c) Four Roses.

In April of 1965, two short months prior to Four Roses' mysterious decision to cancel Hawaiian Oke in favor of McKesson's Portside as its island distributor, Four Roses had noitified McKesson that Hawaiian Oke was to be the exclusive distributor of Kessler and that McKesson was to be cancelled as a co-distributor of that line. (Tr. 1302; Exh. P-111.) This April, 1965 decision by Four Roses was partially based on McKesson's poor performance. (Tr. 1302.) *Moreover, in the middle of May, 1965, Four Roses sent to Hawaiian Oke a renewal contract.* (Tr. 1444.) Yet, one month later Hawaiian Oke was terminated in favor of a yet not fully developed division of McKesson. Exhibit P-110 indicates that Hawaiian Oke's 1964 sales of Four Roses exceeded the 1966 performance of Portside. Finally, Kaufman (Four Roses) himself, in his letter (Exh. P-77) and testimony (Tr. 1444-46), cast suspicion on the reasons behind his company's termination of appellee. Therefore, the jury could have reasonably rejected the factual contention that Four Roses terminated Hawaiian Oke on the basis of sound business reasons.

(d) Frankfort.

The lack of an independent business reason for the termination of Hawaiian Oke is also apparent in the case of the Frankfort line. Frankfort's Western Manager, Flick, testified that earlier distribution of its McKenna

label by McKesson was unsatisfactory. (Tr. 1580-1586; Exh. P-83.) Flint, Vice President of Frankfort, did not even discuss the economic or competitive advantages of a change in distributorship with McKesson officials. Instead, he decided to terminate Hawaiian Oke *because Calvert and Four Roses were doing so.* (Tr. 1582.)

The Frankfort executives indicated that the quality of a distributor's sales staff is always a matter of concern to the supplier. (Tr. 1599-1600.) Yet, at the time Frankfort terminated Hawaiian Oke and agreed to go along with the new house "plan", Portside had no sales staff or sales manager. Indeed, on July 2, 1965—approximately two weeks *after* making the decision to go with Portside—Flick (Frankfort) wrote Maloney (McKesson) seeking information as to who the new sales manager would be, the names and number of salesmen on the sales staff, and the address of Portside. (Exh. P-84; Tr. 1589.)

D. Injury Suffered by Hawaiian Oke.

A great deal of economic data was presented to the jury regarding the damage to appellee's business as a result of the appellants' illegal combination. Appellee's primary claim for damage was based on the diminution of the value of its business operation: the difference between the value of the business as a "going concern" and the liquidation value actually received by Hawaiian Oke shareholders.[5] (Exh. P-1 through P-5.) Appellee also sought to re-

[5]Appellee made no claim for future lost profits *qua* profits. Evidence of anticipated future profits along with a table of "price-earnings" multiples (Exh. P-5) were introduced to afford the jury a basis for determining the going concern value of Hawaiian Oke as of the date of appellants' conspiracy.

cover actual out-of-pocket losses occasioned by the appellants' illegality.

The evidence showed that between 1958 and 1961, Hawaiian Oke lost nearly $250,000 from its operations. (Tr. 233-234.) These losses were not in any way attributed to the acts of any defendant. In October 1961, Theodore (Ted) Wong was brought in to supervise the operation; Ted Wong had an extensive educational and business background. (Tr. 135-141.) Wong immediately set out to comprehensively rehabilitate the business, instituting programs of expense control and effectuating many profitable changes. (Tr. 141-145.) Wong reduced the amount of warehouse space and subleased a portion of the unneeded area. (Tr. 144.)

Subsequently, Hawaiian Oke was able to acquire the Calvert and Frankfort lines. (Tr. 145-146.) Hawaiian Oke's total operation went from a net loss of $50,179.54 in 1961 to net gains of $8,260.80 in 1962, $2,640.11 in 1963 and $2,497.85 in 1964. (Tr. 541-545.) Moreover, while the Hawaiian liquor market was generally poor in 1963 and 1964, all prospects for the future, with an anticipated increase in tourism, were bright. (Exh. P-75; Tr. 748-752; 2395.) This is confirmed by the significant increase in Hawaiian Oke's sales in the first three months of 1965 (as compared with the same period in 1964). (Tr. 1183-1184.) In addition, it was clear that in late 1965 Hawaiian Oke was to become the state-wide distributor of Calvert's new Leilani Hawaiian Rum (Tr. 1641) which was expected to be a highly popular and profitable line and one which was extremely attractive to McKesson. (Tr. 345-346.)

Hawaiian Oke's recent profitable trend and bright outlook for the future was relevant economic data indicating a business with a "going concern" value. Its performance as a distributor, since being rehabilitated in 1962, was most impressive. Its depletions of Calvert brands far exceeded the performance of earlier distributors (including McKesson). (Exh. P-106 through P-109.) Appellee also showed superiority over McKesson in the simultaneous distribution of Four Roses' Kessler line. (Exh. P-111.) Four Roses officials were so impressed that they had decided to terminate McKesson and permit Hawaiian Oke to distribute the Kessler brand exclusively. (Tr. 1302.) Moreover, Barton's Hawaii depletions were increased from 758 cases in 1961 to 5,401 cases in 1964—an increase of 700%—and the outlook for 1965 was even greater. (Exh. P-113.)

Thus Hawaiian Oke was an organization on the move with whose performance suppliers were increasingly satisfied—and they so stated. (Exh. McK-39; Tr. 793; 1260; 2580.) Many individuals, some with extensive liquor industry experience expressed the desire to purchase the Hawaiian Oke. (Exh. P-71; Tr. 688, 1645-46, 1816.) One prospective purchaser, Emilio Gonzales, not only related his interest in acquiring Hawaiian Oke but mentioned the figure of $360,000 in this connection. (Tr. 1645-46.)

Appellee also presented a certified public accountant who analyzed the financial history of appellee—its sales trend and expense control ability—and made certain computations about Hawaiian Oke's prospects. These projections were made on the basis of appellee's books, records, tax returns and financial statements. The studies demon-

strated a bright future—the growth potential of appellee as an important component in determining the value of the business as a going concern. The jury was shown projections of sales and profits which appellee would be expected to enjoy. (Exh. P-1; P-2; P-3.) It was demonstrated that had Hawaiian Oke's business pattern not been interrupted by a loss of four of its major suppliers, it could have realized a profit at year's end of $45,256. (Exh. P-2; Tr. 1105.) Moreover, profits could be expected to increase each year thereafter. (Tr. 1105-1118.)

In addition to this matter of the appellee's "going concern" value, evidence was introduced relating to "out-of-pocket" losses suffered by Hawaiian Oke as a result of appellants' illegal combination. The evidence summarized above demonstrated that 1965 would have been a profitable year for Hawaiian Oke. Yet, it was shown that because of the combined boycott organized and effectuated by the appellants, Hawaiian Oke sustained an "out-of-pocket" loss of $35,000 in 1965 prior to and in connection with liquidation. (Exhs. P-1, P-2, P-5, P-6; Tr. 544.)

III

QUESTIONS PRESENTED

1. Was the evidence sufficient to support the verdict that appellants combined and conspired to terminate business dealings with appellee in violation of Section 1 of the Sherman Act?

2. Did the trial court commit prejudicial error in the admission and rejection of certain evidence on the issue of conspiracy?

(a) Was the Friedman statement relevant and admissible for the purpose of demonstrating his state of mind and rebutting Barton's alleged "independent business" reasons for terminating appellee?

(b) Was the evidence relating to McKesson's performance after the termination relevant in showing the comparative quality of appellee as a prior distributor of the same liquor products in Hawaii?

3. Did the trial court commit prejudicial error in its instructions regarding the issue of conspiracy?

(a) Did the court's instructions correctly state the applicable law?

(b) Did the instructions proposed by appellants so correctly characterize the facts and state the applicable law that they could and should have been given without qualification?

(c) Was the Court's instructions relating to the legal capacity of the unincorporated divisions of the House of Seagram, Inc. to conspire among themselves and the participation of Joseph E. Seagram & Sons, Inc. in directing such an illegal combination correct, or, in any event did that instruction become moot by virtue of the jury's finding that all of such Seagram entities combined and conspired with both Barton and McKesson?

4. Was there sufficient relevant economic data to support the jury's verdict that appellee had been damaged in the amount of $65,000?

5. Did the trial Court commit prejudicial error in giving and refusing instructions on the issue of damages?

(a) Did the Court's instructions correctly state the applicable law?

(b) Did the instructions proposed by appellants so correctly characterize the facts and state the applicable law that they could have been given without qualification?

IV

APPELLEE'S RESPONSES TO THE SPECIFICATIONS OF ERROR

The Appendix to this brief consists of a table which specifically refers to the portions of appellee's argument which are responsive to each of appellants' assignments of error.

V

SUMMARY OF ARGUMENT

In late June and early July of 1965, appellee received in rapid succession, notices from four of its major suppliers that it was being terminated as a distributor of these suppliers' liquor products in Hawaii. The evidence established that survival of appellee's business was just not feasible thereafter in view of the importance of the lines (both in terms of brand name and percentage of appellee's total business) and the lightning like speed with which the mass terminations occurred. The salient facts and the chronology of events clearly demonstrate

that this group boycott was the result of a plan for combined action promoted and organized by McKesson, one of appellee's competitors.

The *unique* decision to open the second house was made a short ten to fourteen days after the idea was conceived; and only after extensive meetings and discussions between McKesson officials and executive officers of the suppliers involved (Calvert, Four Roses, Frankfort and Barton).

There was evidence demonstrating that the plan to open a second house was aimed primarily at appellee. Of the various independent liquor distributors in Hawaii, only appellee's suppliers were pirated. Indeed, more than 87% of the 1966 liquor sales by Portside consisted of the products of appellee's former suppliers. The evidence further demonstrated that each supplier was aware of the fact that he was part of this combination and each agreed to keep the plan secret from Hawaiian Oke until the date of the terminating action.

On June 3, 1965 Calvert and Jos. E. Seagram officials met with McKesson representatives, and the idea of a second house was conceived. Calvert wanted to go with McKesson but refused to do so unless a separate house was formed. All parties concerned realized that the new house required additional lines. The other lines mentioned at that early date were: Four Roses, Frankfort and Barton—all of which were then distributed by Hawaiian Oke. On June 14 or 15 Maloney (McKesson) met with Friedman and Weinstock of Barton informed them that McKesson would open a second Hawaiian house *if* Barton would join with Calvert as the major suppliers of that house. (Exh. P-71) Barton agreed to join the

plan at that time (evidenced by the agreement to keep the entire matter a secret, and the "Dear Sheldon" letter); and *only then* did McKesson commit itself to open the second house. In the meantime, Cotler (McKesson), Murphy (Calvert), and Yogman (Jos. E. Seagram) had similar commitments from Four Roses and Frankfort to join Calvert and Barton in terminating Hawaiian Oke. The plan was not revealed, and McKesson did not commit itself to open the second house until *after* discussions with Calvert and Barton representatives. The evidence thus compels the conclusion that the appellant suppliers entered into the plan on a mutually conditional basis. Joint action was contemplated and essential to the success of the scheme. *Interstate Circuit, Inc. v. United States,* 306 U.S. 208, 226-227 (1939); *United States v. General Motors Corp.,* 384 U.S. 127 (1966); *Flintkote Co. v. Lysfjord,* 246 F.2d 368, 375 (9th Cir. 1957).

Each supplier alleged independent business reasons for the termination—but the evidence presented, showing appellants' anti-competitive purposes and demonstrating that appellee was an excellent distributor, justified the jury's rejection of appellants' contention.

The plan, as it was executed, then, constituted a classic example of a concerted refusal to deal which is violative *per se* of Section 1 of the Sherman Act. *United States v. General Motors Corp.,* 384 U.S. 127 (1966); *Klor's, Inc. v. Broadway-Hale Stores, Inc.,* 359 U.S. 127 (1959).

The objections raised by appellants regarding the trial Court's rulings and instructions that the three unincorporated divisions of the House of Seagram, Inc. (Calvert, Four Roses and Frankfort), were legally capable of con-

spiring are nothing more than mere "smokescreens". These objections have been rendered moot by the jury's determination that the House of Seagram, Inc. and Joseph E. Seagram & Sons combined and conspired with Barton and McKesson.

Nor did the court commit prejudicial error in admitting certain items of evidence (the Friedman statement and evidence of Portside's 1966 performance) demonstrating state of mind and otherwise contradicting the alleged "independent business" reasons proffered by appellants as the grounds for terminating appellee's distributorship.

Finally, the evidence was sufficient and provided ample relevant economic data to support the jury's determination that appellee sustained injury to the extent of $65,000 (before trebling). *Story Parchment Co. v. Patterson Parchment Paper Co.*, 282 U.S. 555 (1931); *Bigelow v. R.K.O. Radio Pictures, Inc.*, 327 U.S. 251 (1946). The relevant economic data showing the diminution in the value of appellee's business as a "going concern" was properly established by testimony and charts presented by experts and others relating to prospective sales, expenses and profits. Moreover, the expressions of interest by prospective purchasers and their recognition of the "going concern" value of a business such as appellee's were all relevant. So, also, the evidence relating to appellee's out-of-pocket losses was proper and sufficient.

The instructions given by the trial court on the issues of conspiracy and damages correctly stated the applicable law. On the other hand, the instructions proposed by appellants and refused by the court either merely restated those given or so improperly characterized the facts and

applicable law as to be incapable of being given without qualification. Thus, no prejudicial error was committed in the giving or refusing of instructions by the trial court.

It was for the jury to assess and analyze the totality of the evidence of the conspiracy and the resulting injury to the appellee. This Court should not reweigh and reanalyze the factual questions best left in the hands of the jury. *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962); *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685 (1967); *Washington State Bowling Prop. Assn. v. Pacific Lanes, Inc.*, 356 F.2d 371 (9th Cir. 1966). The judgment should be affirmed.

VI

ARGUMENT

A. THE EVIDENCE PRESENTED AT TRIAL WAS CLEARLY SUFFICIENT TO JUSTIFY THE JURY'S DETERMINATION THAT APPELLANTS ACTED IN CONCERT IN VIOLATION OF SECTION 1 OF THE SHERMAN ACT IN THEIR TERMINATION AND REFUSAL TO DEAL FURTHER WITH APPELLEE, HAWAIIAN OKE

(Response to Appellants' Assignment of Error, No. 1)

1. The Trial Court's Refusal to Grant Appellants' Motions for Directed Verdict, Judgment N.O.V. and a New Trial Was Proper.

(a) The Applicable Legal Standard Requires This Court to Respect the Factual Determinations of the Jury.

Appellants ask this Court to sit as a jury: to reanalyze the voluminous record (the trial transcript alone is in excess of 3000 pages); to reweigh the credibility of the witnesses and the relative importance of the testimony presented at the trial of this lawsuit. Unless appellants can demonstrate that the jury's finding of a conspiracy

was "clearly erroneous" *Columbia Pictures Corp. v. Chas. Rubenstein, Inc.*, 289 F.2d 418 (8th Cir. 1961); *Besser Mfg. Co. v. United States*, 343 U.S. 444, 446-7 (1952), that factual determination cannot be set aside merely because a contrary conclusion could have been reached. *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685 (1967).

Appellants suggest that the trial court erred in refusing to direct a verdict in their favor at the close of plaintiff's evidence; and that it compounded its error in refusing to enter judgment *non obstante verdicto* or to order a new trial after the jury returned in plaintiff-appellee's favor. Appellants now ask this Court to do what the trial judge properly refused to do—to substitute its factual judgment for that of the jury.

The cases and precedents are unequivocal in supporting the trial court in its refusal to direct a verdict. *Wilkerson v. McCarthy*, 336 U.S. 53 (1949); *Case-Swayne Co. v. Sunkist Growers, Inc.*, 369 F.2d 449 (9th Cir. 1966). As this Court stated in *Case-Swayne* (369 F.2d at 452):

> "In ruling on a motion for a directed verdict, the trial court is required to view the evidence in the light most favorable to the party against whom the motion is made. 'On appeal, likewise, the appellate court must consider the evidence in its strongest light in favor of the party against whom the motion was made, and must give him the advantage of every fair and reasonable intendment that the evidence can justify'. [citing 5 Moore's Federal Practice 2316 (1951)] This is true 'even though contrary inferences might reasonably be drawn' " [citing *Continental Ore Co. v. Union Carbide*, 370 U.S. 690, 696 (1962)]

To the same effect are: *Lucero v. Donovan,* 354 F.2d 16, 21 (9th Cir. 1965) and *Schnee v. Southern Pac. Ry.,* 186 F.2d 745, 746 (9th Cir. 1951).

In *Schnee* this Court advised that in ruling on a defendant's motion for directed verdict, the trial court must look only to the evidence and reasonable inferences therefrom which support the plaintiff's case. Moreover, in such circumstances, the trial court must assume and accept the plaintiff's evidence and its reasonable implications as true. (To the same effect: *Girardi v. Gates Rubber Co.,* 325 F.2d 196 (9th Cir. 1963); *United States v. Blair,* 193 F. 2d 557 (10th Cir. 1952).)

These same principles restrict the trial court's authority to grant judgment *n.o.v. Safeway, Inc. v. Preston,* 269 F.2d 781 (D.C. Cir. 1959); *Hansen v. Firestone Co.,* 276 F.2d 254 (6th Cir. 1960), or to order a new trial. 39 Am. Jur., New Trial §131, p. 141 (1942 ed.).

(b) The Existence of a Combination or Conspiracy by the Appellants Herein May Be Proven by Evidence of the Circumstances Surrounding Their Activities, Viewed As a Whole.

Appellants, in their Brief, attempt to compartmentalize specific items of evidence as to the inferences which they support. Such a position is clearly unjustified. Numerous decisions have made it clear that the jury must be permitted leeway in viewing the "whole picture". *Lessig v. Tidewater Oil Co.,* 327 F.2d 459, 466 (9th Cir. 1964). In *Lessig,* this Court admonished that the trier of fact must be given "the full benefit of all evidence without tightly compartmentalizing various factual components" of the alleged conspiracy. 327 F.2d at p. 466. See also: *Sanitary*

Milk Prod. v. Bergjans, 368 F.2d 679, 691 (8th Cir. 1966). In so ruling, this Court was following the clear and express mandate of the United States Supreme Court regarding the important constitutionally defined role of the jury in appraising and assessing the evidence of the existence of a conspiracy. *Continental Ore Co. v. Union Carbide & Carbon Corp., supra.*

Moreover, appellants, in their Brief, point to "Conflicts in the Evidence" (page 21, *et seq.*), as if to imply that their presentation of evidence negates the jury's finding of a conspiracy. Such a position shows little regard for this Court's long standing position of deferring to the factual determinations of the jury. As Judge Hamley stated in *Standard Oil Co. v. Moore,* 251 F.2d 188, 198 (9th Cir. 1957), in determining the sufficiency of evidence of a jury's finding of conspiracy ". . . all reasonable inferences, favorable to the verdict, are to be drawn". Moreover, all conflicts in evidence must be resolved in favor of the verdict; it must be assumed that the jury, as it has the right to do, disbelieved those portions of the defendants' evidence which are inconsistent with the verdict. (251 F.2d at p. 198.) It is clear, then, that this Court should view the evidence favorable to the appellee's case as a whole and not search the record for evidence which contradicts the jury's verdict. *Standard Oil Co. v. Moore, supra,* at p. 210.

It has been recognized that the difficulty of proving a conspiracy is greater in cases, such as ours, where there are only a few conspirators. Rahl, Conspiracy and the Antitrust Laws, 44 Ill. L. Rev. 743, 757 (1950). This Court has not compelled a showing of direct evidence to

prove conspiracies. *Flintkote Co. v. Lysfjord,* 246 F.2d 368 (9th Cir. 1957); *Esco Corp. v. United States,* 340 F.2d 1000 (9th Cir. 1965). It is well recognized that in the modern world of sophisticated business practices, corporate officers do not keep written records of their anti-competitive agreements and activities. As the Third Circuit Court of Appeals observed:

> ". . . In this modern era of increasing subtleties, it is rare indeed for a conspiracy to be proved by direct evidence. There is no dispute over the proposition that circumstantial evidence will sustain a finding of conspiracy". *Milgram v. Loew's, Inc.,* 192 F. 2d 579, 583 (3rd Cir. 1951), cert. denied 343 U.S. 929 (1952).

In the final analysis, the jury must decide whether, considering all of the relevant circumstances, the defendants have acted independently or in concert. *Loew's, Inc. v. Cinema Amusements,* 210 F.2d 86 (10th Cir. 1954). As was stated in the *Loew's* case:

> ". . . it is not necessary in a case of this kind that there be direct evidence of a conspiracy. . . . More often than otherwise, direct evidence of such a conspiracy is not available. But it may be proved by a development and collation of the circumstances. It may be inferred from the things said and done". 210 F.2d at p. 93, citing *Eastern States' Retail Lumber Dealers' Ass'n v. United States,* 234 U.S. 600 (1914).

With these considerations in mind, then, we shall review the evidence presented by appellee in the trial below. This evidence, viewed in its most favorable light and necessarily accepted as true, will indicate the propriety of the trial court's refusal to grant a directed verdict, a

judgment *n.o.v.*, or a new trial. Moreover, the evidence so viewed will demonstrate that this Court must likewise refrain from disturbing the jury's determination that appellants conspired, combined and acted in concert in terminating and refusing to deal further with appellee, Hawaiian Oke. *Case-Swayne Co. v. Sunkist Growers, supra;* 5 Moore's Federal Practice 2316 (and cases there cited).

2. The Evidence Presented, and the Reasonable Inferences, Which Were Drawn Therefrom, Support the Jury's Finding of a Concerted Refusal to Deal With Appellee by the Appellant Suppliers, Organized by and Effectuated Through Appellant McKesson & Robbins, One of Appellee's Competitors.

Appellants seek to equate this case with a situation where *a* supplier has decided to change *its* distributor. They have cited such cases as *Ace Beer Distributors v. Kohn, Inc.*, 318 F.2d 283 (6th Cir. 1964) and *Schwing Motor Co. v. Hudson Sales Corp.*, 138 F.Supp. 899 (D. Md. 1956) as authority for the proposition that a manufacturer may validly terminate one distributor in favor of another.

It is not necessary here to quarrel with the principle of these cases. They just do not apply to this case. Both *Ace Beer* and *Schwing* concerned a termination by *one supplier, acting alone*. However, in the present case, the jury found a combination—a horizontal agreement—between various suppliers, acting together, at the instance of appellee's competitor, to terminate and refuse further dealings with appellee Hawaiian Oke. This concerted action resulted, foreseeably, in the destruction of appellee. The concerted switch of distributors also increased the

market power and business volume of appellee's competitor—McKesson—who played such an instrumental role in organizing the group boycott among suppliers. This case must be reviewed in accordance with the standards established in *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 127 (1959) and *United States v. General Motors Corp.*, 384 U.S. 127 (1966).

Viewing the chronology of events wholly and giving to appellee the benefit of all reasonable inferences, it is perfectly clear that the jury could have found a combination among the appellants to terminate plaintiff and assist in the establishment of a new distributor, Portside.

Granting that Calvert originally approached McKesson to consider the possibility of a change of distributors in Hawaii, the undisputed fact that Calvert imposed, as a condition precedent to any such move, the establishment of a second house by McKesson is the critical fact from which the concerted action sprang. McKesson and Calvert alike recognized that a second house could not succeed with Calvert alone. The new house required a rounded line of various types of liquor at different price levels in order to adequately service retailers' needs. Thus, the key to the Calvert switch to McKesson—on its condition imposed basis—was the securing of such lines for the new house. At this point, the concert of action among suppliers and McKesson became indispensable to the accomplishment of the common goal—the establishment of a viable new distributorship accomplished by elimination of appellee. What better prey than Hawaiian Oke which would already be injured by the loss of Calvert—a key line? McKesson, then, with the assistance of Seagram

officers, seized the opportunity to steal the most important of appellee's business and eliminate it as a competitor.

Thus, on the very same day as the first serious Calvert-McKesson meeting to consider the switch, McKesson proposed that the second house could be stocked with a series of lines which were either already in the McKesson house or belonged to appellee. With at least four other viable wholesalers in Hawaii having important lines, it is strange that McKesson never considered and actually made no effort to take lines from any of them. Certainly this critical fact should be accorded weight in determining whether McKesson organized and promoted a group boycott of Hawaiian Oke to eliminate it as a competitor.

That Yogman of Jos. E. Seagram & Sons, Inc., was present at the June 3 meeting to assist in the shift of other House of Seagram divisions (Four Roses and Frankfort) to McKesson is fairly inferable from all of the facts, considering particularly that Four Roses, acting on its own, had offered to renew appellee's distributorship and that McKesson never had any direct contact at all with Frankfort. More important, Maloney of McKesson recited in a letter to his superior that Seagram, through Yogman and its President, Edgar Bronfman, actually asked McKesson to get into this "deal". Plainly, then, Yogman (and/or Bronfman) acted as liaison between McKesson and the divisions of the House of Seagram in arranging a concerted and simultaneous termination of plaintiff and shift to McKesson in order that the new house might open up with a complete line of products.

That all of these facts were communicated to Barton is plain. Friedman and Weinstock were told by Maloney

of the imminent switch by the House of Seagram lines (or at least two of them) to McKesson. Indeed, they were asked—in typical conspiratorial style—to keep this information secret from appellee. And only after this meeting in which the imminent switch of the House of Seagram lines was revealed and agreed to be kept in confidence did McKesson actually advise Calvert that it had decided to go forward with its new house—presumably on the assurance of Barton that it would join the plan to terminate plaintiff and open Portside.

All of Barton's assertions to the contrary can be disbelieved—particularly in light of McKesson's several memoranda indicating Barton's presence in their new house and, more importantly, Kauhane's "Dear Sheldon" letter to Friedman (whom he had never met) inquiring when Barton proposed to advise Hawaiian Oke of its loss of the Barton line. This letter preceded by more than a week the date on which Friedman visited with appellee in Hawaii and allegedly decided to make the move. Further, in the light of Friedman's state of mind "European deal" admission, the jury could easily have disregarded all of the Barton "afterthought" reasons for terminating appellee.

The abnormal business behavior in this case should not be overlooked. Do sophisticated liquor manufacturers move into a distributorship before it has a sales manager, a sales staff or is otherwise even capable of functioning? Why did McKesson elect to open a second house in Hawaii—the only place it has ever done so? Why did a supplier, Four Roses, which had recently tendered a renewal contract to its distributor suddenly switch to a

yet unopened house? What prompted an executive vice-president of a distiller (Jos. E. Seagram) to sit in on a routine meeting involving one of the marketing divisions of a subsidiary company and a distributor particularly when that officer is (a) not an officer of the subsidiary having marketing responsibility and (b) not himself responsible for marketing activities? Why did a McKesson vice-president say that "pressure" should be applied to the president of giant Seagram concerning some "deal" the latter had devised?

These unusual circumstances, viewed cumulatively and in conjunction with the sequence of events, demonstrates that there was a concerted effort here to open Portside by terminating Hawaiian Oke's key lines. It is totally presumptuous to suggest that on the basis of the record here—considering the state of the law as to which the jury was properly instructed—that the jury could not have found concerted action in violation of Section 1 of the Sherman Act. *United States v. Paramount Pictures, Inc.,* 334 U.S. 131 (1948); *United States v. United States Gypsum Co.,* 333 U.S. 364 (1948); *Interstate Circuit, Inc. v. United States,* 306 U.S. 208 (1939).

In the *Paramount Pictures* case, the Supreme Court stated:

> "It is not necessary to find an express agreement in order to find a conspiracy. It is enough that a *concert of action is contemplated* and that the *defendants conform to the arrangement.*" 334 U.S. at p. 142 (citing *Interstate Circuit, Inc. v. United States, supra,* and *United States v. Masonite Corp.,* 316 U.S. 265 (1942)) (Emphasis added.)

In the *United States Gypsum* case the Court observed that a finding of conspiracy is especially proper where the declarations of the parties support the fact that each had knowledge of the parallel activities. In our case, the evidence clearly demonstrated that Calvert and other Seagram executives were well aware of the need for combined action by suppliers to form a new McKesson house. Calvert and other Seagram executives knew and freely discussed the need for additional lines; they were made aware of McKesson's interest in having Barton join into the plan (Exh. P-71). Barton executives were well aware of Calvert's (and most probably other Seagram Division's) plan to terminate Hawaiian Oke.

Thus, the Supreme Court in *United States Gypsum* may have been referring to the very situation present in our case when it stated:

> "Those two cases [*Interstate Circuit, Inc. v. United States, supra,* and *United States v. Masonite Corp., supra*] establish that when a group of competitors enters into a series of separate but similar agreements with competitors or others, a strong inference arises that such agreements are the result of concerted action. That inference is strengthened when contemporaneous declarations indicate that supposedly separate actions are part of a common plan." 333 U.S. at p. 394.

The appellants have argued, citing this Court's opinion in *Independent Iron Works, Inc. v. United States Steel,* 322 F.2d 656 (9th Cir. 1963), that similar behavior by competitors—even with knowledge—does not alone support a conspiracy. (Opening Brief of Appellants, pages

23-24.) The *Independent Iron Works* case is clearly distinguishable from our own. In our case there was a great deal more than mere parallel behavior among appellants. The jury could have reasonably found that the activity of each appellant was conditionally dependent upon similar behavior by each of the suppliers in terminating Hawaiian Oke. *Interstate Circuit, Inc. v. United States, supra.* In the *Independent Iron Works* case, this Court indicated another basis for distinguishing the present case when it stated:

> ". . . the inference of a conspiracy among the defendants might have been permissible if [there was] proof that defendants' policies of distribution were aimed at plaintiff alone. . . ." 322 F.2d at p. 664.

This latter statement more properly describes our case. It was clear from the beginning of the plan herein involved that McKesson's efforts to induce joint action "were aimed at" Hawaiian Oke. At the June 3, 1965 meeting with Seagram executives, the Calvert and Four Roses lines were mentioned. (Tr. 2667-8.) Both of these were suppliers of Hawaiian Oke. At the McKesson meeting later that same day, Barton, Frankfort, Calvert and Four Roses were the lines mentioned for the new house. (Tr. 342-49.) All four of these were then suppliers of Hawaiian Oke. In the June 7, 1965 memo, Kauhane's listing of possible new lines for the second house again "aimed at" Hawaiian Oke (Exh. P-71), as did McKesson's interest in distributing Barton products in Hawaii. (Tr. 1516-17; Exh. P-74.)

This Court's opinion in *Independent Iron Works,* then, is not dispositive of this case. Nor is the Supreme Court's

decision in *Theatre Enterprises, Inc. v. Paramount Film Distrib. Corp.,* 346 U.S. 537 (1954), frequently cited in appellants' Brief, relevant to our case. In *Theatre Enterprises,* the Court merely affirmed a jury determination that no conspiracy was present. In our case the jury found that a conspiracy was formed by appellants. More in point, for our case, then, is the following statement by Judge Barnes in *Flintkote Co. v. Lysfjord,* 246 F.2d 368, 375 (9th Cir. 1957):

> "But there was evidence from which an inference might have been drawn by the trier of fact warranting the belief that defendant . . . supplier . . ., *could have acquired knowledge of the conspiracy;* and there was evidence which warranted the conclusion that [defendant] with inferred knowledge *participated in the conspiracy, and aided it, by its refusal to sell to plaintiffs.*" (Emphasis added.)[6]

In the creation of McKesson's second house, concerted action was invited, anticipated, and realized. McKesson's "invitation" to the distiller-appellants required, for the successful operation of that house, the mutual and simultaneous participation of various suppliers. The fact that the entire plan was "aimed at" and anticipated a combined termination of appellee—with each distiller-appel-

[6]In *Milgram v. Loew's Inc.,* 192 F.2d 579, 583 (3rd Cir. 1951) the Court ruled that parallel refusal to deal coupled with the fact that each defendant ". . . acted with knowledge of the [similar] policies of his competitors . . ." was sufficient to establish an illegal conspiracy.

In *Wm. Goldman Theatres v. Loew's, Inc.,* 150 F.2d 738, 745 (3rd Cir. 1945) the Court stated:

> "Uniform participation by competitors in a particular system of doing business, where each is aware of the others' activities, the effect of which is a restraint of interstate commerce, is sufficient to establish conspiracy . . ."

lant having knowledge of the terminating action of the others and the effect of such a combination upon Hawaiian Oke—clearly constitutes a conspiracy in violation of Section 1 of the Sherman Act. *Interstate Circuit, Inc. v. United States,* 306 U.S. 208, 226-227 (1939); *United States v. General Motors Corp.,* 384 U.S. 127 (1966).

Moreover, the jury could reasonably have concluded that the various terminations of Hawaiian Oke were not the product of independent business judgment. Appellants have cited *Delaware Valley Marine Supply Co. v. American Tobacco Co.,* 297 F.2d 199 (3d Cir. 1961), for the proposition that similar refusals by three suppliers to deal with a new company was not sufficient to establish a conspiracy. (Opening Brief, pages 22, 23.)

Our case is not comparable to the *Delaware Valley* case as appellants have suggested. There, the plaintiff was a new company, soliciting various suppliers. The fact that several suppliers refused to do business with the new company was not of significant probative weight in establishing that the suppliers acted in concert. In our case, however, there was a prior history of dealing between appellant suppliers and appellee Hawaiian Oke. We have here an instance where four regular suppliers combined to simultaneously terminate their business dealings with a distributor which had served each of them well for several years. The evidence showed that Hawaiian Oke was doing more business in Hawaii for each of the involved suppliers than any previous distributor (including McKesson) had ever done for them before. The evidence showed that each such supplier had expressed satisfaction with Hawaiian Oke's performance. Under these circum-

stances, the joint termination of Hawaiian Oke and switch to the newly "unformed" Portside was wholly inconsistent with good business judgment. In such cases the finder of fact is justified in regarding appellants' testimony of independent action and ignorance of the acts of others as "incredible". *Milgram v. Loew's, Inc., supra,* 192 F.2d at p. 585.

Thus in the present case, where several suppliers acted similarly and simultaneously, and in a manner that was contrary to their apparent economic self-interest, the inference that they acted pursuant to an agreement becomes even stronger. *Bordonaro Bros. Theatres, Inc. v. Paramount Pictures Inc.,* 176 F.2d 594 (2d Cir. 1949). Unlike the suppliers in the *Delaware Valley* case, the appellants here could say "yes", "no", or "I will terminate if the others do likewise." Because the jury found that the appellants followed the latter alternative, the verdict must be affirmed.

This Court has long recognized that the issue of whether appellants' refusal to deal with appellee was the result of illegal concert of action or individual business decisions

> ". . . must be judged by the trier of facts, to determine if it was an innocent and lawful exercise of the seller's private right, or an act which showed knowing participation in an unlawful conspiracy." *Flintkote Co. v. Lysfjord,* 246 F.2d at p. 376 (9th Cir. 1957).

In our case the jury has already determined that the joint termination of Hawaiian Oke "showed a knowing participation in an unlawful conspiracy" by the appel-

lants. This determination by the jury must not be disturbed on appeal. A recent statement by the Supreme Court is clearly applicable to the present case:

> "... it has long been settled that explicit agreement is not a necessary part of a Sherman Act conspiracy —certainly not where, as here, joint and collaborative action was pervasive in the initiation, execution, and fulfillment of the plan." *United States v. General Motors Corp.,* 384 U.S. at pages 142-143 (citing *United States v. Parke, Davis & Co.,* 362 U.S. 29; *United States v. Bausch & Lomb Optical Co.,* 321 U.S. 707; *F.T.C. v. Beechnut Packing Co.,* 257 U.S. 441).

3. The Appellants' Combined and Concerted Activity in Terminating and Refusing to Deal With the Appellee, Constituted a Group Boycott Which Is Violative Per Se of Section 1 of the Sherman Act.

Section 1 of the Sherman Act provides, in part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal." (15 U.S.C. §1.)

In the Argument above, appellee has already demonstrated that its evidence sufficiently justified the jury's determination that the appellants combined in a plan resulting in the concerted refusal by several suppliers to deal with Hawaiian Oke.

Because they restrict free and open competition in the marketplace, concerted refusals to deal are unlawful *per se* even if they are pursued with good intentions or for lawful reasons. *Fashion Originators' Guild v. F.T.C., infra; United States v. Trenton Potteries Co.,* 273 U.S. 392 (1927); *Klor's, Inc. v. Broadway-Hale, supra; Ford*

Motor Co. v. Webster's Auto Sales, 361 F.2d 874 (1st Cir. 1966).

In *Klor's,* Mr. Justice Black (speaking for eight members of the Supreme Court) stated:

> "Group boycotts, or concerted refusals by traders to deal with other traders, have long been held to be in the forbidden category . . .
>
> "Plainly the allegations of this complaint disclose such a boycott. This is not a case of a single trader refusing to deal with another." (Citing *United States v. Colgate,* 359 U.S. at 212.)

The evil inherent in a concerted refusal to deal is that the competitive freedom of the parties is unreasonably restricted. In our case, appellee was unaware of the forces in motion against it until the boycott was a *fait accompli.* In the words of the *Klor's* case, the boycott took from Hawaiian Oke the freedom to deal "in an open competitive market and drives it out of business as a dealer in the defendants' products. It deprives the . . . [suppliers] of their freedom to sell . . ." (359 U.S. at 213.) As such, the group boycott imposes a harmful and artificial burden on competition. It is a device laden with anti-competitive overtones. *United States v. General Motors Corp. supra.*

In their Brief (at page 34) appellants argue that in the liquor industry "such an arrangement may, in fact, be the only practicable means available for a small company to enter the market". As such, appellants seem to be seeking an exemption from antitrust laws for the liquor industry. This same type of argument was made by the defendants in *United States v. General Motors Corp.,* 384

U.S. 127 (1966) and was rejected by the Supreme Court. In that case, the court made a statement about the objectionable activity there that must also apply to the present appellants' concerted termination of Hawaiian Oke:

> "It is of no consequence for purposes of determining whether there has been a combination or conspiracy under § 1 of the Sherman Act that each party acted in its own lawful interest. Nor is it of consequence for this purpose whether the 'location clause' and the franchise system are lawful or economically desirable." (384 U.S. at p. 142.)

Appellants further argue that a concerted refusal to deal with Hawaiian Oke is not *per se* unlawful unless undertaken with the purpose of furthering some additional anti-competitive purpose such as discriminatory treatment, price fixing, etc. (Opening Brief, pp. 27-36.)

Such a position is clearly at odds with the view adopted by the Supreme Court: *Eastern States' Lumber Assn. v. United States,* 234 U.S. 600 (1914); *Fashion Originators' Guild v. F.T.C.,* 312 U.S. 457 (1941); *Associated Press v. United States,* 326 U.S. 1 (1945); *United States v. Columbia Steel Corp.,* 334 U.S. 495, 522-23 (1948); *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons,* 340 U.S. 211 (1951); *Klor's Inc. v. Broadway Hale Stores, Inc.,* 359 U.S. 207 (1959); *Continental Ore Co. v. Union Carbide, supra; United States v. General Motors Corp., supra.* As the Supreme Court observed in *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, supra:*

> "such agreements, no less than those to fix minimum prices, cripple the freedom of traders and thereby

> restrain their ability to sell in accordance with their own judgment."

Appellants herein have also urged that they were justified in refusing to deal with Hawaiian Oke because of alleged concern over extended credit and delay in meeting financial obligations. Even if appellants' allegations are accepted here (though the weight of the evidence would militate against such a conclusion), such are of no avail. Good motives and business judgment may justify *independent* decisions to cancel a distributor, but cannot justify the *concerted* refusal to deal which the jury found to have occurred in the present case. *United States v. General Motors, supra.* This, then distinguishes our case from *Ace Beer Distr. v. Kohn, Inc.,* 318 F.2d 283 (6th Cir. 1964), cert. denied, 375 U.S. 922; and *Schwing Motor Co. v. Hudson Sales Corp.,* 138 F.Supp. 899 (D.Md., 1956) cited by appellants.

As the court stated in *General Motors:*

> ". . . where businessmen concert their actions in order to deprive others of access to merchandise which the latter wish to sell to the public, *we need not inquire into the economic motivation underlying their conduct . . . Exclusion of traders from the market by means of combination or conspiracy is so inconsistent with the free market principles* embodied in the Sherman Act that it is not to be saved by reference to the need for preserving the collaborators' [interests]. (384 U.S. at p. 146; emphasis added.)

Appellants cannot successfully contend that their "arrangement" was justified merely because there was no combination between competitors of the appellee. It is

true that only one of the appellants, McKesson, was a distributor in direct competition with Hawaiian Oke. All of the other appellants are suppliers. Nevertheless, this represents the "classic" group boycott arrangement; it is identical in structure to that condemned by the Supreme Court in the *Klor's* case. There, as here, a competitor of the plaintiff persuaded a number of the plaintiff's suppliers to refuse to deal with the plaintiff. In our case, McKesson persuaded Barton, Calvert, Frankfort and Four Roses to act in concert and terminate all future dealings with Hawaiian Oke. Such an arrangement was condemned in *Klor's* and it must also be condemned here. *Darnell v. Markwood,* 220 F.2d 374 (D.C. Cir. 1955). Appellants' arguments to the effect that other sources of liquor supply were available cannot constitute a defense or justification for their conspiracy. In concerted refusal to deal cases, there is no duty for the victim of the illegality to exhaust other possible sources of supply. *Continental Ore Co. v. Union Carbide, supra.*

Nor can the appellants argue that Hawaiian Oke's business was so trivial and inconsequential that its elimination has no effect upon competition. *Poller v. Columbia Broadcasting System,* 368 U.S. 464 (1962). That same argument was urged and rejected in *Klor's.* The Supreme Court observed (in regard to a concerted refusal to deal with one small businessman):

> "It [a group boycott] interferes with the natural flow of interstate commerce. It clearly has, by its 'nature' and 'character,' a 'monopolistic tendency.' *As such it is not to be tolerated merely because the victim is just one merchant whose business is so small that his destruction makes little difference to the*

economy. Monopoly can as surely thrive by the elimination of such small businessmen, one at a time, as it can by driving them out in large groups. In recognition of this fact the Sherman Act has consistently been read to forbid all contracts and combinations 'which tend to create a monopoly' whether 'the tendency is a creeping one' or 'one that proceeds at full gallop'." (359 U.S. at 213-14, citing *International Salt Co. v. United States,* 332 U.S. 392, 396 (1947); emphasis added.)

It cannot then be successfully denied that the concerted action of the appellants is of the type prohibited, *per se,* under the Sherman Act. *Radiant Burners, Inc. v. Peoples Gas, Light & Coke Co.,* 364 U.S. 656, 660 (1961). As the Supreme Court recently stated:

> "Nor do we propose to construe the Sherman Act to prohibit conspiracies to fix prices at which competitors may sell, but to allow conspiracies or combinations to put competitors out of business entirely." *(United States v. General Motors,* 384 U.S. at 148.)

B. THE TRIAL COURT DID NOT ERR IN GIVING AND REFUSING VARIOUS INSTRUCTIONS ON THE ISSUE OF APPELLANTS' LIABILITY IN COMBINING TO TERMINATE THE APPELLEE

1. The Trial Court Correctly Instructed the Jury That Concerted Termination of Appellee by the Appellants Was a Per Se Violation of the Sherman Act.

(Response to Appellants' Assignment of Error, No. 5)

The appellants have assigned as error (Assignment of Error No. 5, Appendix p. ix) that portion of the court's instruction to the jury as to the illegality *per se* of a con-

certed refusal to deal. (Tr. 3206-9.)[7] The jury was expressly instructed that each of the appellant suppliers "... may, acting alone, for any reason select the customers with whom it deals or refuses to deal." (Tr. 3206.) The jury was told that McKesson, as a competitor of Hawaiian Oke could properly solicit the business of Calvert, Four Roses, Frankfort and Barton. (Tr. 3207.) However, the instruction went on to state that if McKesson "... formed a combination or conspiracy with two or more of those sellers to terminate Hawaiian Oke ..." then such would constitute a *per se* violation of the antitrust laws. (Tr. 3207-8.)

Thus, the jury was instructed that it could find against each of appellants only if it found, from the evidence, that they acted in concert and formed a combination to terminate the appellee. The jury was further instructed "... that the business reasons of ... the parties may be considered ... in determining whether there was, in fact, a combination or conspiracy between them, ... or whether the parties in fact acted independently". (Tr. 3209.) The instruction, as given, represents the law applicable to the facts of this case. *Klor's, Inc. v. Broadway-Hale Stores, Inc., supra; United States v. General Motors Corp., supra.*

In *General Motors,* the Supreme Court made it unequivocally clear that if suppliers concert their action to deprive others (such as Hawaiian Oke in our case) of access to merchandise which the latter seek to sell to the public, the economic motivation of the suppliers is unim-

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[7]That portion of the instruction is fully set forth in appellants' opening brief, appendix pages ix-xii and need not be re-stated here.

portant. (384 U.S. at page 146.) It was the combination, the concert of action (which, in the present case, resulted in destruction of the business of Hawaiian Oke and its elimination from the market) which made the joint termination and refusal to deal with appellee a *per se* violation of the Sherman Act. *United States v. General Motors Corp.*, 384 U.S. at pages 145-146. In the present case, the trial court did *not* instruct the jury that the simultaneous termination constituted a group boycott. The court merely explained that a concerted refusal to deal is illegal *per se* under the Sherman Act and left to the jury the question of whether or not the appellants' activities fell within the definition. Thus the court's action was in conformity with this Court's recent decision in *Washington State Bowling Proprietors Assn., Inc. v. Pacific Lanes, Inc.*, 356 F.2d 371, 376 (9th Cir. 1966).

2. The Trial Court Correctly Instructed the Jury Regarding the Inferences to be Drawn from the Parallel Behavior of the Appellants.

(Response to Appellants' Assignment of Error No. 8)

The instruction given[8] by the trial court stated that "mere similarity of conduct among various persons, and the fact that they have associated with each other, and may have assembled together and discussed common aims and interests, does not necessarily establish proof of the existence of a conspiracy". (Tr. 3202.) The court went on to instruct that while parallel behavior is admissible circumstantial evidence from which an agreement may be inferred "nevertheless proof of parallel business behavior

[8]That portion of the instruction involved is set forth in appellants' opening brief, appendix page xvii and need not be re-stated here.

does not of itself necessarily establish an agreement". (Tr. 3202.) The court further instructed the jury that the evidence need not show that appellants "... entered into any express or formal agreement ..." (Tr. 3202.) But the court added:

> "What a preponderance of the evidence must show, in order to establish proof that a conspiracy existed, is that the members in some way or manner, or through some contrivance, positively or tacitly came to a mutual understanding to try to accomplish a common and unlawful plan." (Tr. 3203.)

Again, the above instructions, taken as a whole, constitute a correct statement of the law involved. *United States v. General Motors Corp., supra; Flintkote Co. v. Lysfjord, supra,* 246 F.2d at p. 376.

Appellants state (Opening Brief, p. 46) that the jury was "permitted to infer a conspiracy from parallel behavior alone". Such a contention is absurd upon a *complete* reading of the instruction given. Parallel business behavior, the jury was told, does *not* of itself establish proof of an agreement. The instructions given the jury permitted it to view the whole picture of what occurred in this case, drawing inferences from the development and collation of all the circumstances and from all of the things said and done. This is consistent with the legal standards applicable to antitrust cases. *Continental Ore Co. v. Union Carbide & Carbon Corp., supra; Esco Corp. v. United States, supra; Eastern States' Retail Lumber Dealers' Assn. v. United States, supra.*

Appellants also argue that the trial court erred in refusing to give Barton's Instruction No. 9 (R. 222), Sea-

gram's Instruction No. 5 (R. 231) and Seagram's Instruction No. 11 (R. 357).

Barton's Instruction No. 9 merely restates in a different style and with different emphasis, the trial court's instruction that parallel behavior does not necessarily prove a conspiracy. Barton's instruction also discounts the importance of the knowledge of each member of an alleged conspiracy of the similar activity of his co-conspirators. The trial court did not instruct the jury that mere knowledge by each appellant-supplier of anticipated similar conduct by one or more of the others was sufficient to establish a conspiracy. The trial court did instruct the jury, however, to consider whether these suppliers ". . . were knowingly members of the conspiracy alleged in the complaint." (Tr. 3203.) The jury was instructed that the law does ". . . prohibit independent businesses from becoming associated together in a common plan . . ." (Tr. 3207) or "acceptance . . . of an invitation to participate in a plan, knowing the necessary consequence of which, if carried out, restrains interstate commerce . . ." (Tr. 3212.)

Indeed, the following portion of the trial court's instruction seems to clarify the law on the subject and dispose of appellants' objection:

> "Before you may find that any defendant or entity here has become a member of a conspiracy, a preponderance of the evidence in the case must show that the conspiracy was knowingly formed and that the defendants, or in this case the entities, knowingly participated in the unlawful plan with the intent to advance or further some object or purpose of the conspiracy.

> To act or participate knowingly means to act or participate voluntarily and intentionally, and not because of mistake, or accident, or other innocent reason. So, if any of the entities involved here, Joseph E. Seagram and Sons, Inc., The House of Seagram, Calvert, Four Roses and Frankfort, Barton, any of those, or McKesson, with understanding of the unlawful character of a plan, intentionally encourages, advises, or assists, for the purpose of furthering the undertaking or scheme, he thereby becomes a knowing participant—a conspirator.
>
> One who knowingly joins an existing conspiracy or combination is charged with the same responsibility as if he had been one of the originators or instigators of the conspiracy." (Tr. 3211-3212.)

The trial court's charge is in accord with the applicable law as stated by the Supreme Court: *Interstate Circuit, Inc. v. United States, supra; United States v. Masonite Corp., supra; United States v. U.S. Gypsum, supra;* and as stated by this Court, *Flintkote Co. v. Lysfjord, supra.* To reiterate the language of the *Flintkote* case:

> "But there was evidence . . . that defendant . . . *could have acquired knowledge of the conspiracy;* and there was evidence . . . that [defendant] with inferred knowledge participated in the conspiracy, and aided it, by . . . refusal to sell to plaintiffs." 246 F. 2d at p. 375 (emphasis added).

Seagram's Instructions Nos. 5 and 11 (R. 231 and 357) merely restate in different style and with different emphasis the trial court's charge that appellants, acting independently, had the right to select a new distributor and

the fact that each of them acted similarly does not, of itself, prove the existence of a conspiracy. Indeed, the refused instructions add nothing, in the way of relevant content, to the instruction given. (Tr. 3206-9.)

In *Lessig v. Tidewater Oil Co.*, 327 F.2d 459 (9th Cir. 1964), this Court underscored the importance of instructions which emphasize to the jury that conspiracies may be proven by circumstantial evidence. Indeed, this Court held that "the danger of confusion was increased by language repeatedly emphasizing the necessity for an agreement" as appellants here request. (327 F.2d at p. 472.) Hence, it is probable that appellants' proposed instructions unduly and prejudicially emphasize to the jury an alleged necessity for evidence of some kind of formal "agreement". The *Lessig* case makes it clear that emphasis should instead be placed, in these instructions, on the sufficiency of circumstantial evidence—such as unusual parallel business activity—as proof of the existence of an illegal combination.

Thus, the appellants' contention as to erroneous instructions must be rejected. "A party cannot claim error in the refusal to give a requested instruction which is not entirely correct, or which it is not possible to give without qualification, or which is so framed as to be capable of being misunderstood". *Cherry v. Stedman*, 259 F.2d 774, 777-8 (8th Cir. 1958); *Ursich v. La Rosa*, 328 F.2d 794, 797 (9th Cir. 1964).

Indeed, even if appellants' proposed instructions were absolutely correct, the trial court's refusal of them would not be error in this case. For, as was stated in *Employ-*

ers' Liability Assurance Corp. v. Maes, 235 F.2d 918, 922 (10th Cir. 1956):

> "There is no tenable basis for the contention that the failure to give [the requested instructions] constituted prejudicial error. It is sufficient to say that even though they may be correct statements of the law, the court is not required to give requested instructions if the material issues are covered by the instructions as a whole."

C. THE TRIAL COURT DID NOT COMMIT PREJUDICIAL ERROR IN THE ADMISSION AND REJECTION OF CERTAIN EVIDENCE CONCERNING THE ISSUE OF CONSPIRACY

1. It Was Not Error to Admit the Statement by Friedman As to the Purpose of Seagram's and Barton's Change of Distributors.
(Response to Appellants' Assignment of Error No. 2)

At trial, Ted Wong testified that in a conversation with Sheldon Friedman (Barton) in the latter's Hawaiian Village Hotel room in early July of 1965, Friedman indicated that a possible reason behind the mass termination of Hawaiian Oke was ". . . a deal that McKesson would get Barton distribution in the West Coast . . . and in turn they would receive distribution here in Hawaii". (Tr. 167-8.) Further, Friedman was reported as having said ". . . maybe they [Seagram and McKesson] have a deal some place, maybe in Europe". (Tr. 168.) Appellants contend that the admission of this evidence was erroneous because it was hearsay, speculative and represented the only evidence of an ". . . improper motive for the change of distributors". (Opening Brief, pp. 36-8.)

The appellants' contentions are clearly without merit. The statement was not offered for the truth of what was said. It was *not* put in to prove that there were, in fact, various "deals" between McKesson and the appellant-suppliers, but rather, to show the state of mind of the declarant. The jury was expressly informed by the trial court of this limitation on the use of the statement. (Tr. 168.) At a subsequent point in the trial, Friedman denied having made the statement concerning possible "deals" to Wong. (Tr. 801.) The jury, of course, had the task of determining who was telling the truth in this matter and could have chosen to disbelieve Friedman's denial. *Standard Oil Co. v. Moore,* 251 F.2d 188, 198 (9th Cir. 1957). But inasmuch as the trial court specifically instructed the jury that such evidence could be considered only to show Friedman's state of mind—this Court cannot assume that the jury failed to discharge its duty by refusing to follow the judge's specific admonition. *Spencer v. Texas,* 385 U.S. 554, 565 (1967).

Friedman, in his testimony, urged that the reason behind his company's (Barton) termination of Hawaiian Oke was the latter's poor sales performance and tardiness in meeting debts. (Tr. 825-8.) However, Friedman's statements to Wong are inconsistent with the later contrived competitive reasons for the termination. When Friedman spoke to Wong at that early date, he could have related the alleged economic motivations for the termination. The fact that Friedman instead spoke of vague "deals" relevantly illuminates his state of mind at the time. The prior inconsistent statement, then, is most relevant for the jury's apprisal of Friedman's later inconsistent testimony

at trial concerning alleged competitive reasons for Barton's termination of Hawaiian Oke. In short, it goes to prove that the Barton "business reasons" are really defenses created as an afterthought to meet the exigencies of litigation. *State Farm Mutual Ins. Co. v. Porter*, 186 F.2d 834 (9th Cir. 1950).

The Supreme Court has recently approved of the admission of such statements to demonstrate the state of mind of a co-conspirator in an antitrust case by recognizing that ". . . the collaborator's state of mind is of significance here". *United States v. General Motors Corp., supra,* at p. 147 (footnote No. 22 of Court's opinion).

Thus, the admission of Friedman's statement since it was not offered for its truth, was not erroneous. Even more astounding, however, is appellants' contention that the statement was prejudicial because it provided the only suggestion of an improper motive for termination. In light of the many facts in this case pointing to an anticompetitive combination by the appellants, this contention is untenable. Friedman's statement was trivial and "harmless" (if erroneous at all) in relation to the whole picture which was presented to the jury.

2. It Was Not Error to Admit Evidence of Portside's Performance After the Change in Distributors.
(Response to Appellants' Assignment of Error No. 3)

Appellants argue that evidence comparing Hawaiian Oke's performance before termination with Portside's subsequent performance was inadmissible because "there was nothing to suggest that in June and July of 1965

[appellants] had the slightest reason to suspect that Portside would not do a good job''. (Opening Brief, pp. 39.)[9]

The post-termination, comparative performance of Portside was introduced not to show that appellants should have known that Portside would perform poorly, but rather to demonstrate that Hawaiian Oke was performing relatively well in regard to sales of the distiller-appellants' products in the Hawaii market. It was designed to rebut the appellants' contention that appellee was terminated because of its alleged ''poor performance''. Certainly if Portside's 1966 sales would have shown increases over Hawaiian Oke's—this would have been relevant to confirm appellants' contentions that Hawaiian Oke was not an effective distributor. Therefore, inasmuch as Portside's performance was clearly inferior to that of appellee, the evidence was admissible to help support a contrary inference—that Hawaiian Oke was in fact an effective distributor of the products involved. This is consistent with the:

> ''. . . established judicial rule of evidence that testimony of prior or subsequent transactions, which for some reason are barred from forming the basis for a suit, may nevertheless be introduced if it tends rea-

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[9]This assertion, though irrelevant, is not true. There was a great deal of evidence (as outlined in more detail in the Argument above) showing that at the time of the switch in distributors, Portside was still on paper—unhoused, unstaffed and inoperable. Thus, the jury could well have rejected the "legitimate business" reasons proffered by appellants to justify the termination of Hawaiian Oke.

sonably to show the purpose and character of the particular transactions under scrutiny."

United Mine Workers of America v. Pennington, 381 U.S. 657, 670 (footnote 3 of Court's Opinion) (1965), citing

Standard Oil Co. v. United States, 221 U.S. 146-47 (1911);

FTC v. Cement Institute, 333 U.S. 683 (1948).

See also:

Continental Ore Co. v. Union Carbide & Carbon Corp., supra, 370 U.S. at 709-710;

Armco Steel Corp v. No. Dakota, 376 F.2d 206 (8th Cir. 1967);

Ohio Valley Electric v. General Electric Co., 244 F.Supp. 914 (S.D. N.Y. 1965).

3. The Trial Court Did Not Err in Excluding from Evidence a 1966 Letter (Ex. B-67) Regarding Barton's Replacement of Portside As Its Distributor.
(Response to Appellants' Assignment of Error No. 4)

Exhibit B-67 was a May 25, 1966 letter from Spengler & Sons, another distributor of liquor products in Hawaii, in response to an inquiry by Barton regarding the possibility of switching to Spengler from Portside. (Tr. 863-67.) At trial, one of appellants offered this letter to rebut the inference of conspiracy. Clearly, such a post-conspiracy declaration by a party defendant is self-serving hearsay. *Richardson v. Walsh Constr. Co.*, 334 F.2d 334 (3rd Cir. 1964); *Mandel v. Pennsylvania R. Co.*, 291 F.2d 433 (2nd Cir. 1961) *cert. denied* 368 U.S. 938. Hence the Spengler letter was properly excluded.

More important, however, other evidence concerning Barton's purported dissatisfaction with Portside and its discussions with Spengler was admitted and these matters were aired before the jury. (Tr. 854-62.) Thus, the letter itself was cumulative (Tr. 867); and it was therefore solely within the discretion of the trial court to admit or exclude. No real prejudice has been shown in the exclusion of this merely cumulative item of evidence. 29 Am. Jur. 2d, Evidence § 256, p. 307 (1967 Ed.).

Even, assuming *arguendo,* that some error was committed in this regard, such error clearly was not such as could have influenced the outcome of the case. Hence, if error is found, it must be recognized as "harmless".

D. THE JURY'S AWARD OF DAMAGES IS SUPPORTED BY PROPERLY ADMITTED ECONOMIC DATA

> "Juries, being gifted with the power to put a dollar value on a person's reputation, or his eyesight, or his wife's affections, or even his life itself, should have little trouble with so relatively simple a proposition as measuring in dollars the amount of injury a monopolist . . . or a conspirator has inflicted upon his victim's business or property." Rowley, *Proof of Damages in Antitrust Cases,* 32 A.B.A. Antitrust L.J. 75 (1966).

In accord with this spirit, the Supreme Court has liberally permitted antitrust plaintiffs to introduce as evidence any "relevant data" which would aid the jury

in making a "just and reasonable estimate" of damages which are not capable of precise ascertainment.

Story Parchment Co. v. Patterson Parchment Paper Co., 282 U.S. 555, 565 (1931);

Eastman Kodak Co. v. Southern Photo Co., 273 U.S. 359 (1927);

Bigelow v. RKO Radio Pictures, 327 U.S. 251 (1946).

The rationale underlying these cases, in part, is based upon the inherent difficulty in exact measurement of damages in antitrust actions. But an overriding consideration in each case is that the specific ascertainment of a plaintiff's damages is clouded by the illegal and anti-competitive practices of the defendants involved.

In *Bigelow,* the Court stated:

> "In such a case, even where the defendant by his own wrong has prevented a more precise computation, the jury may not render a verdict based on speculation or guesswork. But the *jury may make a just and reasonable estimate of the damage based on relevant data* and render its verdict accordingly. In such circumstances 'juries are allowed to act on probable and inferential as well as upon direct and positive proof' (citing *Story* and *Eastman*). *Any other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim.* It would be an inducement to make the wrongdoing so effective and complete in every case as to preclude any recovery, by rendering the measure of damages uncertain. Failure to apply it would mean that the more grievous the wrong done, the less likelihood there would be of a recovery. The most elementary conceptions of justice and public policy require that *the*

> *wrongdoer shall bear the risk of the uncertainty which his own wrong has created."* 327 U.S. at pp. 264, 265. (Emphasis added.)

In our case, appellee has clearly demonstrated the *fact* of injury, i.e., that appellants' illegal combination foreclosing sources of supply has resulted in the destruction of appellee's business and its elimination from the market. Therefore, the only issue to be resolved is whether the items of evidence offered by appellee constituted relevant economic data which would aid the jury in ascertaining the extent of damages resulting from appellants' illegal anti-competitive combination.

The evidence indicated that between 1958 and 1961 Hawaiian Oke lost nearly $250,000 from its operations. (Tr. 233-234.) In October of 1961, Theodore (Ted) Wong was brought into the business by his father Henry A. Wong who was then president of appellee. Ted Wong had an extensive educational and business background (Tr. 135-141) and was given managerial duties. Under Ted Wong's management, Hawaiian Oke underwent a kind of rehabilitation—a series of significant changes were effected, including but not limited to improved systems of inventory control, establishment of an effective accounting system, reduction of the necessary warehouse space which permitted the sub-leasing of the unneeded area, and the securing of fresh capital for the business. (Tr. 141-145.) Subsequently, appellee was able to acquire the Calvert and Frankfort lines. (Tr. 145-46.) Hawaiian Oke's total operation went from a net loss of $50,179.54 in 1961 to net gains in 1962 ($8,260.80); 1963 ($2,640.11); and 1964 ($2,497.85). (Tr. 541-45.) Moreover, while the

Hawaiian liquor market was generally poor in 1963 and 1964, all prospects for the future, with an anticipated increase in tourism, were bright. (Exh. P-75; Tr. 748-52; 2395.) This is confirmed by a significant increase in Hawaiian Oke's sales in the first three months of 1965 (as compared with the first three months of 1964). (Tr. 1183-84.)

In addition, it must be observed that Hawaiian Oke's performance as a distributor, since being rehabilitated by Ted Wong in 1962, was extremely impressive. Hawaiian Oke's depletions of Calvert brands from 1963 to 1965 far exceeded the performance of earlier distributors (including McKesson) and the later performance by Portside. (Exh. P-106, P-107, P-108, P-109; Tr. 1048-55.)

In one instance, where Hawaiian Oke and McKesson were distributing the same product (Kessler) for Four Roses—appellee's performance was far superior to its competitor. (Exh. P-111.) As was pointed out earlier, this had prompted Four Roses to give the exclusive Kessler distributorship to Hawaiian Oke. (Tr. 1302.) This decision was made only two short months prior to Four Roses' sudden and "mysterious" termination of Hawaiian Oke. (Tr. 1302.)

Hawaiian Oke's distribution of Barton products was even more significant. Barton's Hawaii depletions were increased from 758 cases in 1961 to 5,401 cases in 1964 (approximately a 700% increase), and the outlook for 1965 was even greater. (Exh. P-113.) Significantly, Portside's performance for Barton for the full year of 1966 was below Hawaiian Oke's Barton depletions for the first eight months of 1965. (Tr. 1071.)

The jury, then, was able to observe, in Hawaiian Oke, the picture of a small struggling business in a classic "turnaround" situation. This was a business which, with fresh, young, enthusiastic management, was on the way up—increasing sales and controlling expenses. (Exh. P-3; Tr. 1105-1111.) This was a distributor which was performing well for its suppliers in Hawaii—better than those suppliers had seen before or since.

The suppliers had acknowledged their satisfaction with Hawaiian Oke's performance. (Exh. McK-39; Tr. 793, 1260, 2580.) Yet, as has been shown, these same suppliers, whose Hawaiian business was growing, conspired together and combined with McKesson to terminate Hawaiian Oke. This anti-competitive termination rang the death knell for appellee—destroying its business. Now these appellants, having destroyed a small, struggling, improving business, tell this Court that the damages they caused are unascertainable and thus cannot be assessed.

It is clear that in an antitrust case such as ours, where the jury finds that defendants' anti-competitive acts have caused damage to plaintiff's business, the jury may estimate damage based on relevant data. Moreover, the jury may act on probable and inferential proof. *Story Parchment Co. v. Patterson Parchment Paper Co., supra; Eastman Kodak Co. v. Southern Photo Co., supra; Bigelow v. RKO Radio Pictures, supra; Loew's Inc. v. Cinema Amusements,* 210 F.8d 86, 95 (10th Cir. 1954).

As we shall demonstrate, appellants' contentions as to the inadmissibility of certain evidence relating to damages —really only go to the weight that the jury should have given such evidence. These questions must be left to the

collective wisdom of the jury. As this Court recently observed in *Washington State Bowling Prop. Assn. v. Pacific Lanes, Inc., supra:*

> ". . . a factual question was presented to the jury for its determination which we are without power to change. Nor can we say the verdict is grossly excessive, or such as to shock our conscience." (356 F.2d at p. 379.)

1. The Trial Court Properly Admitted Exhibits and Testimony Relating to Appellee's "Going Concern" Value.

Appellee Hawaiian Oke did not seek lost profits as damages. Instead, appellee sought to recover the difference between the value of the business which was destroyed and the liquidated value actually received. Appellee sought additionally certain "out-of-pocket" losses. (Tr. 39, 2960, 2964.) It is clear that both such items of damage are recoverable. *Story Parchment Co. v. Patterson Parchment Paper Co., supra.*

The United States Supreme Court and this Court have recognized the right of a victim of an antitrust violation to recover the difference between the value of its business as a going concern at the time of the violation and the actual liquidation value after the violation has taken its toll. *Story Parchment Co. v. Patterson Parchment Paper Co., supra; Standard Oil of Calif. v. Perkins,* 1967 Trade Cases 72,265, p. 84,618 at p. 84,622 (9th Cir. 1967). See also: *Atlas Bldg. Prod. Co. v. Diamond Block & Gravel Co.,* 269 F.2d 950, 959 (10th Cir. 1959).

During the course of the trial, appellee offered a great deal of evidence relating to the value of Hawaiian Oke as a "going concern". The jury was shown the financial

statements of Hawaiian Oke including profit and loss statements illustrating its favorable growing business trend. (Exh. P-1.) The jury was shown a prospective sales and profit projection based upon computations of an expert witness. (Exh. P-2, P-3.) The jury was told of the interest of several individuals in purchasing the appellee's business. (Tr. 209-220; 688; 383-386; 1630-1633; 1645-1646.) The jury was informed of the comparative operation of McKesson's Honolulu division, and it was able to compare the amount of business done by McKesson's Portside in 1965-66 (most of which was derived from sales of products formerly supplied to Hawaiian Oke). (Exh. P-4, P-17B, P-122; Tr. 1088.) The jury was able to estimate, based on the competent opinion testimony of experts, as well as officers of appellee and appellants, that the future outlook of the liquor industry in Hawaii was extremely favorable (Tr. 2395) especially with a rise in tourism and appellee's anticipation of distributing Leilani Hawaiian Rum (Tr. 1638-1640; 2212).

Thus the jury was shown the portrait of the appellee as an established liquor distributor in Hawaii with young aggressive management, growing increasingly prosperous, establishing new highs in case sales and ready to capitalize on the anticipated natural growth of its industry. It is submitted that this economic data was abundantly sufficient for the jury to estimate the damage to appellee which resulted from appellants' illegal combination.

In the face of the clear evidence of damage to appellee, appellants challenge the admissibility of some of the relevant economic data which was submitted for the jury's consideration. Appellee will respond *seriatim.*

(a) The Caldwell Exhibits.

(Response to Appellants' Assignment of Error No. 9)

In demonstrating its loss, appellee offered, *inter alia,* evidence relating to the "going concern" value of the business in the form of exhibits prepared by Mr. Grant Caldwell, a certified public accountant. (Exhs. P-2, P-3, P-4 and P-5.) Caldwell was qualified and represented by appellee only as an expert in accounting computations. (Tr. 1140-41.) *Atlas Bldg. Prod. Co. v. Diamond Block & Gravel Co., supra,* at p. 958. It is clear that in determining the "goodwill" or "going concern" value of a business, it is relevant and desirable to investigate prospective profit potential. *Standard Oil Co. v. Moore, supra,* 251 F. 2d at 219; see also: Doyle, *Treble Damages and Counsel Fees;* A.B.A., Antitrust Handbook, p. 549 (1958); Timberlake, *The Legal Injury Requirements and Proof of Damages in Treble Damage Actions,* 30 Geo. Wash. L. Rev. 231 (1961). Caldwell served the purpose of informing the jury of the history and trend of Hawaiian Oke's sales, expenses and profits. It was demonstrated that Hawaiian Oke's annual sales had increased substantially in every year since 1962 when Ted Wong took over managerial duties. (Exh. P-1.) Moreover, although appellee showed a net loss of approximately $50,000 in 1961, it accomplished net gains in 1962, 1963 and 1964 (the last *full* year of its operation). (Tr. 541-45). In calculations based on actual figures for the most recent years, Caldwell demonstrated that Hawaiian Oke's projected *net* income for the calendar year of 1965 (had appellants not combined to destroy its business in mid-year) was $45,256. (Exh. P-2.) This amount was determined by comparing the ratio of appellee's sales during the first six months of 1964 to

total sales for that year and then applying that ratio, using actual sales figures for the first six months of 1965, to the full year of 1965. (Tr. 1092-99; Exhs. S-3, S-4, S-5, McK-24, McK-25.)

In conducting this computation of anticipated net profit for the calendar year 1965, Caldwell utilized his expertise in appraising the figures as to Hawaiian Oke's sales trend and ability to control expenses. (Tr. 1092-99.) Caldwell further stated that he chose the most conservative method of projecting future profits. (Tr. 1173-75.) To Caldwell, again exercising his expertise in accounting, a sales trend is an important means of projecting future profits. (Tr. 1116-18; 1165.) Once a company hits a "break even" point (where sales exceed expenses), then a healthy sales trend becomes the significant factor in determining the profitability of a business. (Tr. 1105-18.) It, then, is enlightening to note that Hawaiian Oke's sales for the first three months of 1965 had increased 17% over sales for the first three months of 1964. (Tr. 1183-84.) From all of this information, Caldwell went on to project the sales trend for 1965-1969. (Exh. P-3.) Again, it must be emphasized that these projections of anticipated profits were *not* put to the jury as the measure of damages. The projections merely served as relevant data for the purpose of permitting the jury to appreciate the future prospects of Hawaiian Oke. These projections, coupled with additional evidence regarding the beneficial effect on the liquor business in Hawaii which would result from an increase in tourism (Tr. 2048, 2395), provided some relevant economic data for the jury in assessing the "going concern" value of Hawaiian Oke. *Standard Oil Co. v. Moore, supra.*

Moreover, additional relevant data was provided for the jury in Exh. P-5 and Caldwell's testimony regarding the business communities traditional utilization of "price-earnings" ratios for assessing the value of a going concern. (Tr. 1146.)[10]

Appellants challenge the trial court's action in permitting the jury to treat Caldwell as an expert witness. (Opening Brief, pages 51-54.) Yet it is clear that Caldwell was qualified as an expert Certified Public Accountant. However, he was not represented as having any expertise as to the appellee's actual business operation or *its specific* "going concern" value, and he *never* undertook to express an opinion on either of those subjects. The jury was instructed to weigh all of these factors (e.g., education, experience, soundness of reasoning, etc.) in appraising expert opinion testimony—even to the extent of rejecting the opinion entirely if they so chose. (Tr. 3193.)

Appellants objected to Caldwell's testimony based upon counsel's legal theory of the case and upon business records of Hawaiian Oke. (Opening Brief, pages 48-49.) Yet it must be accepted beyond dispute that testimony as to past business activities of a plaintiff in an antitrust case is one of the elements to be taken into consideration in determining damages. *Twentieth Century-Fox v. Brookside,* 194 F.2d 846 (8th Cir. 1952).

[10]Had the jury fully accepted Caldwell's estimate that Hawaiian Oke would earn a net profit of $45,256 in 1965 (Tr. 1105; Exh. P-5), its verdict could have been based on a "going concern" value for appellee of $450,000 (10 times annual earnings). The actual verdict of $65,000 could be supported, however, had the jury found that Hawaiian Oke could be expected to earn only $10,000 or less during 1965. Such a finding is extremely reasonable, indeed somewhat conservative, in light of the relevant economic data submitted for their consideration.

The utilization of counsel's legal theory was not error. For, as this Court has stated:

> "We do not see much difference between the suggested formula as an assist in arriving at just and reasonable damages, and a chart placed on a blackboard in a personal injury case, *where plaintiff's lawyer outlines his computations as to loss of earnings, pain and suffering, and the various other items of damage.* The plaintiff is not required to prove with mathematical certainty the amount of its damage resulting from a defendant's violation of the anti-trust laws." *Richfield Oil Corp. v. Karseal Corp.*, 271 F.2d 709, 714 (9th Cir. 1959.) (Emphasis added.)

As was stated above, Caldwell was represented merely as an expert in accounting and computation, not as an expert in the appraisal of appellee's specific "going concern" value. Appellants admit that they were permitted to cross-examine Caldwell ". . . on the method of computation". (Opening Brief p. 50.) They objected, however, to not being permitted to cross-examine Caldwell as to specifics concerning Hawaiian Oke's value. Since Caldwell neither possessed nor claimed expertise as to the specifics of appellee's operation (Tr. 1072-73; 1091-92; 1179; 1188-90), cross-examination on that point was properly refused.[11] For this reason, *Berguido v. Eastern Air*

[11]Contrary to statements made by appellants in their brief, their cross-examination of Mr. Caldwell was very extensive and generally uninterrupted. The cross-examination of Caldwell consumes nearly one hundred pages of the trial transcript (Tr. 1151-1247), and was conducted for a major part of an afternoon session (March 30, 1967) and a full morning session (March 31, 1967) of the trial. Also, during direct examination, there was extensive voir dire examination (e.g., Tr. 1023-30; 1091-2; 1095-1104; 1131-45) of Caldwell by appellants. Few objections to the questions propounded during the cross-examination of Caldwell by

Lines, Inc., 317 F.2d 628 (3rd Cir. 1964) cited by appellants, is distinguishable from our case.

Thus, it is clear that the exhibits and the computations and projections by Caldwell were admissible as presenting to the jury some relevant economic data from which the jury could estimate what the future profit potential of Hawaiian Oke was for the ultimate purpose of ascertaining what the value of the business as a "going concern" would have been but for appellants' illegal conduct. Courts in antitrust cases have unequivocally accepted the relevancy and propriety of estimated projections of an injured plaintiff's performance to establish damages. *Bigelow v. RKO Radio Pictures, supra; Volasco Products Co. v. Lloyd A. Fry Roofing Co.*, 346 F.2d 661 (6th Cir. 1965); *Wm. H. Rankin Co. v. Associated Bill Posters*, 42 F.2d 152 (2d Cir. 1930), cert. denied 282 U.S. 864 (1930); *Twentieth Century Fox v. Brookside, supra; Standard Oil Co. v. Moore, supra.*

In an earlier case, the Second Circuit specifically approved of such evidence when it stated:

> "Complaint is also made about the introduction of proof by the plaintiff through the *testimony of a certified public accountant of a computation he had made from the plaintiff's books of account* to show damages which flowed from the cutting off of its supply of the products of the Frankfort Distilleries. *That was competent evidence.* William H. Rankin Co. v. Associated Bill Posters of United States and Canada, 2 Cir., 42 F.2d 152. *If the computation was incorrect it was sub-*

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appellants' counsel were sustained. Moreover, most of those sustained merely related to questions involving the specific operation of Hawaiian Oke as to which Caldwell was not represented as having expertise.

ject to being overcome by proof to that effect but that did not make it inadmissible." *Connecticut Importing Co. v. Frankfort Distilleries,* 101 F.2d 79, 81 (2d Cir. 1939). (Emphasis added.)

Other objections to the exhibits by the appellants (Opening Brief pp. 54-66) merely go to the weight which the jury should have given to them—not to their admissibility:

(a) Even though Seagram and Barton distributorships were not transferable, the jury could have concluded that a prospective purchaser would have been influenced by the fact that these suppliers were presently with Hawaiian Oke. The jury also could have reasonably concluded that these suppliers would have stayed with Hawaiian Oke even in the event of an acquisition. (Tr. 2669-70.) For this reason and others, men who know the liquor business such as Cotler and Gonzales recognized that established liquor distributors do have a "going concern" value. (Tr. 383-86; 1645-46.)

(b) Even though some of the projections were based on figures which included some income from the leasehold, the figures upon which profit projections were based also included *expenses* of the leasehold. (Tr. 2061.) Moreover, the existence and extent of leasehold income was shown to the jury so that they could weigh it in relation to the projections. (Exh. P-1; Tr. 239-271; 1132-34; 2063-70.) The evidence presented by Caldwell related only to the damage to the "going concern" value of appellee's liquor distributorship. The leasehold had no significance to this issue.

(c) Appellants contended that the ratio of the first six months sales to full year sales was invalidated for calendar year 1965 because of an alleged unusually large volume of sales (for tax reasons) in June of 1965. Again, this factor was pointed out for the jury to consider in assessing the probative weight of the projections. (Tr. 1242.) However, it was also demonstrated that greater sales in the second half of the year are attributed to the "Christmas-New Year" holiday season; *and in 1965, in spite of a similar tax buying spree for McKesson (appellee's competitor) in June of 1965, its sales in the second half of 1965 were higher than in the first half*—as was the pattern of Hawaiian Oke's sales in all prior years. (Tr. 1789-93; Exh. P-123.) The jury could well have concluded that had Hawaiian Oke been free from illegal restraint its sales in late 1965 would have exceeded sales for the first half of 1965—consistent with the pattern of earlier years.

Even appellants' expert witness, S. W. Vasquez, admitted that the projected sales for 1965 by Hawaiian Oke would exceed the 1964 sales by nearly 5%. (Tr. 1740.) And the increase, he admitted, would have been much greater if Hawaiian Oke's sales in the second half of 1965 could have *equaled* sales for the first half. (Tr. 1798.) Vasquez also admitted following the same format and methodology of computation as utilized by Caldwell, although he disagreed with the actual figures. (Tr. 1772-73.)

Appellants, in their Brief, frequently allude to the 1962 case of *Volasco Products Co. v. Lloyd A. Fry Roofing Co.,*

308 F.2d 383 (6th Cir. 1962), in condemning "speculative evidence" of damages. They fail to note, however, that in 1965—in the second *Volasco* case—the Sixth Circuit specifically approved of the use of "* * * a mathematical projection based on the prior business of the plaintiff." *Volasco Products Co. v. Lloyd A. Fry Roofing Co.,* 346 F.2d 661, 666 (6th Cir. 1965). That Court went on to say that such "* * * calculations are reasonable and that they give the jury a basis upon which to form a judgment."

Considering all these factors, then, it was proper to admit the exhibits and Caldwell's testimony. The figures and projections were not presented to give the jury a false impression of exactitude, but merely to present relevant information which would help them *estimate* appellee's damage.

> "Damages in such a situation necessarily cannot be assessed with mathematical precison; but the testimony of plaintiff's expert witness * * * while purely an estimate and introduced as such, was proof of a kind as definite and certain as the subject-matter admitted." *Richfield Oil Corp. v. Karseal Corp., supra,* at p. 714, citing *Bordonaro Bros. Theatres, Inc. v. Paramount Pictures, Inc., supra,* and *Wm. H. Rankin Co. v. Associated Bill Posters, supra.*

(b) Comparison of Profits Earned by McKesson
(Also in Response to Appellants' Assignment of Error No. 9)

In their Brief, appellants challenge the utilization of comparative profit figures of appellee's competitor—McKesson & Robbins (Honolulu Division), as relevant data bearing on the issue of damages. (Opening Brief, pages 64-66.) However, it is clear that evidence comparing the income and earnings of plaintiff's competitors who are

free from the anti-competitive restraints of the antitrust violation is relevant and admissible to aid the jury in ascertaining the extent of the damages incurred by the injured victim of the illegal restraint. *Bigelow v. RKO Radio Pictures, supra.* The justice of admitting such comparative figures is even more compelling in cases where the competitor is a party to (or favored by) the antitrust violation. *Milwaukee Towne Corp. v. Loew's, Inc.,* 190 F.2d 561 (7th Cir. 1951); *Haverhill Gazette v. Union Leader,* 333 F.2d 798 (1st Cir. 1964); *Wm. Goldman Theatres v. Loew's, Inc.,* 69 F.Supp. 103 (E.D. Pa. 1946), *aff'd,* 164 F.2d 1021 (3rd Cir. 1948) *Cert. denied,* 334 U.S. 811 (1947).

Appellants recognize the authority of these rulings, but state that no "sound" or "rational" basis for comparing McKesson with Hawaiian Oke existed. (Opening Brief, p. 65.) Appellants primarily cite *Flintkote v. Lysfjord, supra* and *Volasco Products Co. v. Lloyd A. Fry Roofing Co.,* 308 F.2d 383 (6th Cir. 1962) as authority for their position. Our case is significantly distinguishable from both.

In *Flintkote* this Court rejected estimations of what future profit could be made by a newly created business in its infancy based solely upon testimony of plaintiffs who were inexperienced in the management of the business. The testimony related to the maximum amount of money these plaintiffs had made working as salesmen for an established firm, "* * * with no attempt having been made to establish a comparison as to either the businesses or the years * * *" of operation. 246 F.2d at p. 394. Similarly, in *Volasco,* the evidence was not suf-

ficient to probatively demonstrate the capabilities of plaintiff's management and prospective sales performance.

However, in our case, a relevant basis for comparison between McKesson and Hawaiian Oke was established. The jury was apprised of the relatively equal business and educational background of the appellee's manager, Ted Wong, and McKesson's manager, Abe Kauhane; if anything—Wong's credentials were superior. (Tr. 135-145; 2354-2359.) The jury was informed of the entrepreneurial skill of Wong in rehabilitating appellee, after taking his managerial position in late 1961. (Tr. 233-242; Exh. P-1.) Moreover, both organizations served the same geographical market. (Tr. 2367.) The comparative sales ability of the two organizations was appropriately demonstrated to the jury by figures showing appellee Hawaiian Oke's superior performance in the distribution of similar or identical products. (See, for example, Exh. P-106-P-114.) These comparative sales figures demonstrated that Hawaiian Oke's performance was superior to that of McKesson in distributing Calvert products (Tr. 1048-1060); that Hawaiian Oke was favored over McKesson as exclusive distributor of Four Rose's Kessler line on the basis of appellee's superior contemporaneous experience over McKesson in the sale and distribution thereof (Tr. 1302). Furthermore, McKesson's prior distribution of Frankfort's McKenna line was unsatisfactory in comparison to Hawaiian Oke's performance. (Exh. P-83; Tr. 1580-1586.) Appellee's experience with Barton was also significant. The sales increase from 1961 (when Hawaiian Oke took over the line from McKesson), to 1964 was 700%, and included a higher ratio of more profitable

items ("brown goods") than McKesson's pre-1961 performance or Portside's 1966 performance. (Tr. 1071; Tr. 813-817; Exh. P-19, P-116, P-117.)

All these comparative factors unequivocally demonstrate that in management and sales performance the "new" Hawaiian Oke, under the leadership of Ted Wong was an organization with a sales and profit potential *at least* equal to McKesson's. Arguments and evidence proffered by appellants as to McKesson's superiority go merely to the *weight* of the comparison, not to its inherent probative relevance and validity. (Thus, this Court's decision in *Wolfe v. National Lead Co.,* 225 F.2d 427 (9 Cir. 1955) is distinguishable.) The jury was apprised of Hawaiian Oke's rental income (Tr. 1132-1134) as it related to the comparative performance and the fact that comparative figures were mathematical computations based on the financial statements of the two Hawaiian distributors rather than on a personal analysis of the actual operation of each (Tr. 1138-1140). The jury was thus able to assess the weight it believed that the testimony and exhibits comparing Hawaiian Oke and McKesson deserved. (Tr. 3192-3194.)

Moreover, as one of the leading decisions in this field makes clear, exact similarity of the two businesses is not necessary to establish and use comparative performance figures. *Wm. Goldman Theatres v. Loew's, Inc., supra.* All that is necessary is that the comparison illuminate for the jury the business potential of the appellee had it not been victimized by the illegal terminations of the distiller-appellants. In *Goldman* the competitor whose business (theatre) was used as a yardstick operated a

facility which was larger, newer, more elegantly appointed and situated in a better location. Although all of these factors represent extremely important variables in the theatre business, the comparison was allowed and the differences demonstrated merely went to the probative weight to be given to the business statistics involved.

As already noted, the present case presents a much clearer justification for use of comparative business figures. Therefore, the evidence relating to McKesson business was competent as relevant economic data to be weighed by the jury in estimating the extent to which appellants' illegal combination damaged the value of Hawaiian Oke's business.

Moreover, the jury also had before it the actual figures relating to total sales in 1966 by McKesson's second house—Portside. (Exh. P-178, P-122.) Inasmuch as 87.4% of Portside's liquor business was derived from former suppliers of Hawaiian Oke (Tr. 1088), the jury could properly utilize this data as relevant information to aid in their estimation of the volume of business Hawaiian Oke might have done had it been permitted to operate free from anticompetitive interference. *Haverhill Gazette v. Union Leader, supra.*

It was recognized, in the *Haverhill Gazette* case, that where the very existence of plaintiff's competitor is part of an illegal plot, and business acquired by that competitor was lost by plaintiff, such business becomes a part of the damage. Here appellee must be permitted to recover all losses to which defendants' conduct "substantially contributed." *Haverhill Gazette v. Union Leader, supra,* 333 F.2d at pages 806-807; Restatement, Torts, Sec. 431.

(c) Evidence of Expressions of Interest in Purchasing the Business of Hawaiian Oke.
(Response to Appellants' Assignment of Error No. 10)

Appellants cite as error the admission of testimony and a letter relating to the interest of third parties in purchasing the business of Hawaiian Oke. (Opening Brief, pages 66-67.) Appellants contend that this evidence was prejudicial error, but cite merely one case as authority. *Dantzler v. Dictograph Products, Inc.,* 309 F.2d 326 (4 Cir. 1962). *Dantzler* is clearly distinguishable from our case.

In *Dantzler,* the plaintiff was the *only witness* in his own behalf and testified as to his estimate of damage caused by the loss of several customers. 309 F.2d at p. 328. Nothing in that case related to the value of a business or the probative weight of offers to buy a business.

On the other hand, in our present case, testimony as to interest of prospective purchasers was but one item of many which were put to the consideration of the jury in estimating the value of plaintiff's business. The testimony of Ted Wong (coupled with a letter, Exh. P-54) that five different individuals had expressed an interest in purchasing Hawaiian Oke was a relevant consideration. (Tr. 209-220.) Such testimony becomes even more significant upon noting that McKesson, itself, was apparently considering the acquisition of Hawaiian Oke (Exh. P-71; Tr. 688), and the recognition by McKesson that in such acquisitions the purchaser and seller must negotiate a price (Tr. 386). The inference is clear—that established businesses, even those which are merely "breaking even" have a "going concern" value in excess of liquidation value. (Tr. 385-386.)

The most significant evidence on this issue, however, was the testimony of Mr. E. Gonzales, formerly Assistant to the President of Jos. E. Seagram, and later National Sales Manager for Calvert. Gonzales, a man with extensive experience in and knowledge of the liquor industry, related his interest in acquiring Hawaiian Oke and mentioned a figure of $360,000 in this connection. (Tr. 1645-46.) However, Ted Wong was not interested in selling. (Tr. 1646.) Even as late as May of 1965 Gonzales expressed his interest in purchasing Hawaiian Oke to Murphy (Calvert), whose reply was, "Not a chance." (Tr. 1647.)

There was also testimony from Francis Lindus, a potential prospective purchaser (Exh. P-82) that in looking for a profitable liquor distributorship, Hawaiian Oke would be one to consider (Tr. 1816). All of this evidence, taken together, is entitled to be considered by the jury. Moreover, Ted Wong's refusals to sell evidence the firmness of his opinion as to the value and future potential of Hawaiian Oke as a successful and profitable business enterprise. Such testimony is clearly admissible as relevant economic data to aid the jury. *Rangen, Inc. v. Sterling H. Nelson & Sons,* 351 F.2d 851, 856 (9 Cir. 1965); *Union Carbide & Carbon Corp. v. Nilsey,* 300 F.2d 561 (10 Cir. 1961); *Wm. H. Rankin Co. v. Associated Bill Poster,* 42 F.2d 152, 155 (2 Cir. 1930).

2. The Court Properly Admitted Evidence of Appellee's Out-of-Pocket Losses.
(Response to Appellants' Assignment of Error No. 11)

As pointed out above, the evidence of diminution of the "going concern" value of Hawaiian Oke was alone sufficient to support the jury's verdict. However, the jury was also permitted to consider the "out-of-pocket" losses suffered by the appellee which were occasioned by appellants' illegal combination. Damages for these two different and distinguishable types of losses are not mutually exclusive. *Story Parchment Co. v. Patterson Parchment Paper Co., supra.*

During July of 1965, as a result of the distiller-appellants' combined termination of Hawaiian Oke, it became necessary for Hawaiian Oke to begin to "phase out" its operation. (Tr. 273.) Attempts were made by the Hawaiian Oke management to secure additional liquor lines to replace those of the distiller-appellants. (Tr. 288-307.) Of course in making these attempts and in ultimately phasing out the business, it became necessary to temporarily continue the existing organization of Hawaiian Oke and pay rent, salaries, taxes, etc., in order to salvage any value at all upon liquidation. The evidence showed that the illegal terminations substantially contributed to the resulting loss of $35,000 which Hawaiian Oke sustained in 1965. (Tr. 544.) The evidence, already fully summarized elsewhere in this brief, indicated that 1965 would have been a profitable year for Hawaiian Oke but for the illegal terminations. Therefore, it is clear that the appellants' anti-competitive combination substantially caused the appellee's out-of-pocket loss of $35,000 sustained prior to liquidation. (Tr. 544; Exhs. P-1, P-2, P-5, P-6.)

This Court has made it clear that a victim of an antitrust violation is entitled to recover "out-of-pocket" expenses incurred as the reasonably probable result of the defendants' conspiracy. *Flintkote Co. v. Lysfjord, supra,* 246 F.2d at pages 389-392. The evidence described above and the reasonable "common sense" inferences to be drawn therefrom compel us to recognize that when, as here, four major suppliers combined to terminate a liquor distributor, some measure of out-of-pocket damage naturally resulted to the appellee in the interim between the perpetration of the conspiracy and the ultimate demise and liquidation of the victim.

Perhaps this "common sense" factor underlies the liberality of Supreme Court decisions which permit reasonable jury estimations of antitrust damages. *Eastman Kodak Co. v. Southern Photo Materials Co.,* 273 U.S. 359 (1927); *Story Parchment Co. v. Patterson Parchment Paper Co., supra; Bigelow v. RKO Radio Pictures, Inc., supra.* Referring to these cases, the Court recently stated:

> "Where plaintiff proves a loss, and a violation by defendants of the antitrust laws of such a nature as to be likely to cause that type of loss, there are cases which say that *the jury,* as the trier of the facts, *must be permitted to draw from this circumstantial evidence the inference that the necessary causal relation exists." Continental Ore Co. v. Union Carbide & Carbon Co., supra,* 370 U.S. at p. 697 (also citing *Bordonaro Bros. Theatres v. Paramount Pictures, supra* and *Atlas Bldg. Prod. Co. v. Diamond Block & Gravel Co., supra.* (Emphasis added.)

As was ruled in the case of *Haverhill Gazette v. Union Leader, supra,* appellee may recover losses to which de-

fendants' conduct substantially contributed even though there are other causes for the loss. Restatement, Torts, Sec. 341.

E. THE TRIAL COURT DID NOT ERR IN GIVING AND REFUSING CERTAIN INSTRUCTIONS ON THE ISSUE OF DAMAGES

1. Instruction Permitting Consideration of Future Profits. (Response to Appellants' Assignment of Error No. 12)

Appellants challenge the propriety of permitting the jury to consider the loss by appellee of future profits without further instruction that appellee was making no claim for such profits. (Opening Brief, p. 68; Appendix, p. xxiv.)

The trial court's instruction was proper. The jury was told that if it found "that the plaintiff is entitled to some damages, it would be proper for "plaintiff to recover the difference, if any, between the value of its business at the time of the injury, and the amount of money which the stockholders actually received as a result of the liquidation * * *". (Tr. 3216-3217.) The jury was specifically told that in calculating the value of Hawaiian Oke's business, it could look to all the relevant facts relating to the issue, including testimony, exhibits, past profits or losses, the trend of the business, and/or "* * * the evidence which bears on the question of future profits or losses." (Tr. 3216-3217.)

Thus, the jury was expressly instructed that the question of future profits or losses was of relevance in relation to the ascertainment of the Hawaiian Oke's "going concern" value. This properly states the appli-

cable law. *Story Parchment Co. v. Patterson Parchment Paper Co., supra; Standard Oil of Calif. v. Perkins, supra; Atlas Bldg. Products Co. v. Diamond Block & Gravel Co., supra.*

Therefore the instruction given was proper and complete and the trial court committed no error in refusing appellants' proposed instruction MC. (R. 362; Tr. 3122-3123.) *Employer Liability Assurance Corp. v. Maes, supra.*

2. Instruction Permitting Consideration of the Interest of Prospective Purchasers of Hawaiian Oke's Business. (Response to Appellants' Assignment of Error No. 13)

The jury was instructed that it would be proper to consider "* * * the evidence relating to the interest of third persons in purchasing the plaintiff's business and, in fact, as to whether there was a market for the plaintiff's business at all." (Tr. 3217.)

As pointed out, above, there was a substantial amount of evidence of interested, prospective purchasers of Hawaiian Oke. Some of these indications of interest came from individuals with experience and knowledge of the Hawaiian liquor market. There were clear indications that in purchasing such a business, a price in excess of liquidation value could be commanded. (Tr. 385-386; 1645-1646.)

Such testimony, then, must clearly be recognized as relevant economic data which would aid the jury in estimating the fact and extent of appellee's loss, *Rangen, Inc. v. Sterling H. Nelson & Sons, supra,* and in establishing "* * * whether there was a market for plaintiff's business at all." (Tr. 3217.) The instruction, then,

properly stated the applicable law and could not constitute prejudicial error. *Rangen, Inc. v. Sterling H. Nelson & Sons, supra; Union Carbide & Carbon Corp. v. Nilsey, supra; Wm. H. Rankin Co. v. Associated Bill Posters, supra.*

3. Instruction Permitting Consideration of Appellee's Out-of-Pocket Losses.
(Response to Appellants' Assignment of Error No. 14)

As stated above, substantial evidence was presented concerning the out-of-pocket losses suffered by Hawaiian Oke in connection with the "phasing out" of its operation and the liquidation of its business. The trial court, then, properly instructed the jury that it could consider such out-of-pocket losses, if it found that any were incurred as a result of appellants' conduct. (Tr. 3217.) *Story Parchment Co. v. Patterson Parchment Paper Co., supra; Flintkote Co. v. Lysfjord, supra; Haverhill Gazette v. Union Leader, supra.*

4. Instruction Permitting Consideration of the Caldwell Testimony and Exhibits As Expert Opinion; and Refusal of Instruction That Such Exhibits Were Representations of Counsel for Appellee.
(Response to Appellants' Assignment of Error No. 15)

As was stated above, Mr. Caldwell was a certified public accountant. (Tr. 1140-1141.) It is clear that, as such and to that extent, Cadlwell's testimony could properly be treated as reflecting accounting expertise. *Connecticut Importing Co. v. Frankfort Distilleries,* 101 F.2d 79, 81 (2nd Cir. 1939); *Volasco Products Co. v. Lloyd A. Fry Roofing Co.,* 346 F.2d 661, 666 (6th Cir. 1965); *Richfield Oil Corp. v. Karseal Corp., supra; Milwaukee Towne*

Corp. v. Loew's Inc., supra; Arthur Murray, Inc. v. Oliver, 364 F.2d 791 (8th Cir. 1966); *Reserve Plan v. Arthur Murray, Inc.,* 262 F.Supp. 565 (W.D. Mo. 1967); *Twentieth Century-Fox v. Brookside,* 194 F.2d 846 (8th Cir. 1952).

Moreover, the trial court in instructing the jury cautioned that Caldwell was merely an expert in accounting generally and expressly distinguished appellants' expert witness, Mr. Vasquez noting that he was more specifically "* * * presented as an expert economic analyst in the field of the liquor industry." (Tr. 3193.) In addition, the jury was instructed that they should weigh the education, experience and reasoning of the experts and the exhibits which they prepared, and assign probative weight to their testimony and exhibits accordingly, even to the extent of rejecting the expert's opinion entirely. (Tr. 3193-3194.)

The jury was informed, by testimony during trial, that Caldwell had no direct specific knowledge regarding the operation of the appellee's business (Tr. 1072-3; 1091-2; 1179; 1188-90), and that Caldwell's testimony was based on his examination of the unaudited business records and financial reports of Hawaiian Oke. (Tr. Exh. P-1, P-118-121; 1018-23; 1092-3; 1157-65; 1167-1179; 1188-1190.)

Thus under the instructions given the jury was properly told to weigh these matters in assessing the value of the expert testimony. Such clearly represents the applicable law. *Richfield Oil Corp. v. Karseal Corp.,* 271 F.2d 709, 714 (9 Cir. 1959); *Wm. H. Rankin Co. v. Associated Bill Posters, supra.* Therefore the trial court properly instructed the jury and committed no error in refusing

to give Barton's proposed Instruction No. 51 (R. 359; Tr. 3031-3032.) *Employers' Liability Assurance Corp. v. Maes, supra.*

5. The Trial Court's Refusal to Give Barton's Proposed Instruction No. 50 and McKesson's Proposed Instruction No. 11 Relating to Appellee's Rental Income. (Response to Appellants' Assignment of Error No. 16)

During the trial appellants repeatedly alluded to the rental income derived by Hawaiian Oke. The exact amount of such income was designated separately on appellee's financial statement. (Exh. P-1.) It so happened that the rent-related expenses (taxes, utilities, maintenance, insurance, etc.) which would offset these gross-income figures were not separately listed under the appellee's accounting procedures. (Tr. 2063-2066.) The jury was made fully aware of the amount of rental income Hawaiian Oke derived, and was permitted to consider this as a factor in assessing the operational performance of the liquor distributing business.

The relevant economic data submitted through the various witnesses presented by appellee—notably Wong, Caldwell and Gonzales—bore entirely on the value of the liquor distributorship as a "going concern" without regard to the rental income. Caldwell's most significant testimony was his historical and prospective analysis of appellee's liquor *sales* performance.

Thus the fact that Hawaiian Oke enjoyed some amount of rental income and that the leasehold was held in trust for the benefit of Hawaiian Oke shareholders by Thelma Wong (Tr. 2607-08) was unimportant to the crucial issue

of the "going concern" value of appellee's liquor distributorship business at the time the appellants illegally combined and thereby destroyed said business.

The instructions proposed by appellants (Barton's Instr. No. 50; R. 358 and McKesson's Instr. No. 11, R. 361) would have specifically prohibited the jury from considering the rental income which Hawaiian Oke derived in regard to the damage issue. *This would have distorted the damage picture inasmuch as the rent-related expenses would then have been assessed solely against the liquor operation.* Therefore, because the proposed instructions would not have properly guided the jury, and could not have been given without qualification, the trial court did not err in refusing them.

> "* * * a party cannot claim error in the refusal to give a requested instruction which is not entirely correct, or which is not possible to give without qualification, or which is so framed as to be capable of being misunderstood." *Cherry v. Stedman, supra,* 259 F.2d at pages 777-778. See also *Ursich v. La Rosa, supra.*

Even if this Court believes that the appellants' proposed instructions did meet the above standard, refusal to give them was not error. The question of rental income and expenses merely went to the weight to be given by the jury to the appellee's financial statements. The trial court properly instructed the jury and covered the material issue of the need to consider all the relevant economic data as a whole. (Tr. 3216-3217.) Thus, the refusal of appellants' proposed instructions was not prejudicial. *Employers' Liability Assurance Corp. v. Maes, supra.*

6. The Trial Court's Refusal to Give Barton's Proposed Instruction No. 52 Relating to the Value of a Business. (Response to Appellants' Assignment of Error No. 17)

The trial court instructed the jury to "* * * make a just and reasonable estimate of the damage based on all relevant economic data." (Tr. 3216.) The jury was further instructed that appellee could "* * * recover the difference, *if any* * * *" between the value of its business at the time of the injury and the amount stockholders received in liquidation. (Tr. 3216.) The jury was also told to consider evidence relating to past profits *or losses,* prospective profits *or losses,* and "* * * the trend of the plaintiff's business, whether it was improving *or deteriorating.*" (Tr. 3216-3217.) (Emphasis added.)

Had the jury found that the trend of appellee's business was deteriorating and that the future held only the prospects of financial losses then it would have been compelled to recognize that the destruction of Hawaiian Oke's business was a blessing in disguise and hence, no damages would have been awarded. Therefore, Barton's proposed Instruction No. 52 (R. 360)—that a business is not necessarily worth more while operating—was superfluous. Moreover, it is argumentative in light of *Story Parchment Co. v. Patterson Paper Parchment Co., supra.*

It was not error for the trial court to refuse the instruction in question. *Ursich v. La Rosa, supra; Cherry v. Stedman, supra; Employers' Liability Assurance Corp. v. Maes, supra.*

F. THE TRIAL COURT COMMITTED NO ERROR AND APPELLANTS WERE NOT PREJUDICED BY INSTRUCTIONS AND RULINGS CONCERNING COMBINATIONS BETWEEN THE UNINCORPORATED DIVISIONS OF THE HOUSE OF SEAGRAM, INC. AND THE PARTICIPATION OF JOSEPH E. SEAGRAM & SONS, INC. THEREIN.

(Response to Appellants' Assignments of Error Nos. 6 and 7)

1. The Entire Issue Concerning the Legal Capacity of the Unincorporated Divisions of the House of Seagram, Inc. to Combine or Conspire With Each Other Has Been Rendered Moot by the Jury's Finding that All of the Corporate Defendants Combined With Each Other in a Single Conspiracy.

It has long been established that alleged errors in a charge may be cured, or may be rendered harmless or immaterial by the verdict. 53 Am.Jur. Trial § 840. Under the Court's instructions read as a whole, the jury was told it could have found that one or more divisions of the House of Seagram, Inc. conspired with Joseph E. Seagram & Son, Inc., Barton and McKesson. And the verdict establishes that it so found. It is, therefore, impossible for appellants to argue that the instruction regarding the legal capacity of unincorporated divisions to conspire with each other (even if it were assumed to be wrong) could be *prejudicial.*

In *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.,* 370 U.S. 19 (1962), plaintiff, a processor of oranges, sued Sunkist and one of its subsidiary corporations (Exchange Orange) charging conspiracy in violation of Sections 1 and 2 of the Sherman Act. The jury returned a verdict for the plaintiff. Plaintiff contended that these Clayton and Capper-Volstead Acts immunized co-operatives combined and conspired with independent processors. The Court instructed the jury that it was to return a verdict for the defendants

"unless you find . . . from the preponderance of the evidence, that Sunkist or Exchange Orange or either of them combined or conspired with either Tree Street or Silzle or Exchange Lemon Products . . ." Exchange Lemon was another subsidiary co-operative in the Sunkist structure.

The defendants argued that the instruction of the court would have permitted the jury to find a conspiracy between three antitrust immunized co-operatives. This Court rejected the argument and further found that any objection to the instruction was waived. (284 F.2d 1; 9th Cir. 1960.) The Supreme Court agreed with Sunkist and reversed, holding that the "theory of liability upon which the general verdict *may* have rested—a conspiracy among petitioners and Exchange Lemon— . . ." was "erroneous". (370 U.S. at 29-30; emphasis added.) Because the instruction *may* have permitted the jury to find against the defendants on an erroneous legal theory, it was prejudicial and a reversal required.

However, in our case, the "separate division" instruction—even if assumed to be erroneous—did *not* set out a theory upon which this general verdict *may* have rested—the instruction becomes moot and error, if any, is harmless rather than prejudicial. And in *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 469 (1962), the Supreme Court refused to decide the intra-corporate conspiracy issue in an antitrust case which could have been resolved in favor of the plaintiff on a different theory of liability.

2. The Instructions, As Given, Were Correct.

The appellants have argued that Section 1 of the Sherman Act does not prohibit a combination by and between separate divisions of a single corporation. (Opening Brief, p. 13 et seq.) In addition, they have argued that Section 1 would not even prohibit a parent corporation (i.e., Joseph E. Seagram) from directing such divisions of a separate subsidiary corporation (i.e., House of Seagram, Inc.) to change their distributor. (Opening Brief, Appendix at pp. xv, xvi.)

The trial court found that Calvert, Four Roses and Frankfort (which are the three unincorporated divisions involved herein) are separate marketing entities which compete with each other. The presence of this intra-corporate competition, then, is the distinguishing factor between our case and the numerous cases and hypothetical examples cited by appellants in their brief. (Opening Brief, pp. 13-20.) Our case does not involve a vertical combination between the corporation and its officers [*Nelson Radio & Supply Co. v. Motorola,* 200 F.2d 911 (5th Cir. 1952)], nor a vertical combination between the corporation (House of Seagram, Inc.) and its divisions [*Poller v. Columbia Broadcasting System, Inc.,* 284 F.2d 599 (D.C. Cir. 1960), reversed on other grounds, 368 U.S. 464 (1962)[12]; *Deterjet Corp. v. United Aircraft Corp.,* 211 F.Supp. 348 (D. Del. 1962)].

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[12]In reversing, the Supreme Court expressly left open the question of whether the intra-corporate autonomy of divisions makes them separate entities with legal capacity to conspire with one another in violation of §1 of the Sherman Act. 368 U.S. at p. 469. Thus the Supreme Court refused to leave standing the rule of the Court of Appeals here urged by appellants.

In the present case, the unincorporated divisions involved were in active competition with each other. Each such division within the House of Seagram, Inc. was rereferred to as a "company" and each had its own chief executive who reported directly to Mr. Edgar Bronfman, President of Joseph E. Seagram & Sons, Inc. [Note: they did not report to a superior within their same corporate entity, House of Seagram, Inc.] (Tr. 948-949.) Bronfman, himself, testified that the operations of these divisions and their marketing procedures were autonomously conducted. (Tr. 961.)

Each division has its own officers and chain of command (Tr. 2647) and each is responsible individually and independently for decisions as to selection of distributors. (Tr. 2648.) Moreover, each division makes its own independent decisions regarding pricing, advertising, and other marketing policies. (Tr. 2646-2648.) As Roy Flint (Executive Vice President of Frankfort) testified, referring to relationships between divisions: "They run their business and we run ours." (Tr. 1577.)

The various divisions market products which are similar and competitive. (Tr. 2647.) Indeed, it may be recalled that Arthur Murphy (President of Calvert) insisted upon McKesson opening a second house so that Calvert products and competitive Seagram products (especially 7-Crown and Seagram V.O. marketed by the Seagram division and distributed through McKesson's original Hawaiian house) would not be handled by the same wholesale house. (Tr. 1439-1441.)

Thus, appellants' contention (Opening Brief, p. 15) that the unincorporated divisions of The House of Sea-

gram "... have no more independent existence than the clothing department and the furniture department of a retail store ...", is incorrect. Those departments within a retail store do not actively and openly compete with each other. As Jack Yogman (Executive Vice President of Joseph E. Seagram) admitted, the unincorporated divisions of The House of Seagram are self-contained competing units which fight each other as hard as they fight non-Seagram affiliated competitors. (Tr. 971.)

The trial court, then, properly applied Section 1 of the Sherman Act which outlaws every such combination in the form of trust *or otherwise.* The authority relied on by the trial court dates as far back as *Standard Oil Co. of New Jersey v. United States,* 221 U.S. 1 (1911), which admonishes that in enforcing the antitrust laws, the courts must be concerned with substance not form. The judiciary is entrusted with the important public policy of insuring against *every form* of anti-competitive combination. The United States Supreme Court recently has condemned the chary application of the antitrust laws in such a manner as to elevate form over substance. *Albrecht v. Herald Co.,* 88 S.Ct. 869 (1968).

Appellants argue that these separate divisions have no stockholders, assets or liabilities; that their employees are paid by Seagram and freely shifted from one division to another. (Opening Brief, p. 15.) In so doing, appellants have gone outside the record to discuss various irrelevant aspects of Seagram's corporate structure. Finally they allude to the loss of certain tax advantages available to multiple corporations and to the fact that the assets of their single corporation are available to anyone with a

cause of action against any one of the divisions. (Opening Brief, p. 19.) While these matters (all of which are *de hors* the record) may be of some significance in a tax dispute or some other controversy, they should be recognized as immaterial to the present case. The salient facts are that these divisions competed with each other and by combination had the market power to bring about the anti-competitive result wrought in the present case.

As the court below observed the separateness of the divisions in pursuing sales and marketing functions is the critical fact in this case. The antitrust violation charged relates to the illegal termination of Hawaiian Oke as the sales representative of the distiller-appellants (including the involved unincorporated divisions). Just as a business decision in favor of separate corporate existence bears certain consequences under the antitrust laws, so also must a business decision that separate divisions should remain autonomous and compete with one another. This Court must see through the formalistic veil of corporate unity erected here and recognize the separateness of the divisions in their sales and marketing practices—which was the critical aspect of the business operation from appellee's point of view. For as the United States Supreme Court stated in *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.,* 340 U.S. 211, 215 (1951):

> ". . . common ownership and control does not liberate corporations from the impact of the antitrust laws. *e.g., United States v. Yellow Cab Co.,* 332 U.S. 218 (1947). The rule is especially applicable where, as here, respondents hold themselves out as competitors."

VII

CONCLUSION

For the reasons set forth herein, the judgment of the District Court should be affirmed.

Moreover, with respect to this appeal, plaintiff-appellee prays that this Court award it the costs of this appeal and a reasonable attorney's fee. *Twentieth Century Fox Film Corp. v. Goldwyn,* 328 F.2d 190 (9th Cir. 1964).

Dated, San Francisco, California,
May 24, 1968.

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Certificate of Counsel

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Maxwell M. Blecher,
Attorney for Appellee.

(Appendix Follows)

Appendix

Appendix

APPELLEE'S RESPONSES TO APPELLANTS' ASSIGNMENTS OF ERROR

Appellants' Assignment of Error	Appellee's Responsive Argument	Page in Appellee's Brief
No. 1	Argument A	p. 29
No. 2	Argument C-1	p. 56
No. 3	Argument C-2	p. 58
No. 4	Argument C-3	p. 60
No. 5	Argument B-1	p. 49
No. 6	Argument F	p. 91
No. 7	Argument F	p. 91
No. 8	Argument B-2	p. 51
No. 9	Argument D-1(a), (b)	pp. 68, 75
No. 10	Argument D-1(c)	p. 80
No. 11	Argument D-2	p. 82
No. 12	Argument E-1	p. 84
No. 13	Argument E-2	p. 85
No. 14	Argument E-3	p. 86
No. 15	Argument E-4	p. 86
No. 16	Argument E-5	p. 88
No. 17	Argument E-6	p. 90

No. 22,162

IN THE

United States Court of Appeals

For the Ninth Circuit

Joseph E. Seagram and Sons, Inc., The House of Seagram, Inc., McKesson and Robbins Incorporated, Barton Distilling Company and Barton Western Distilling Co.,

Appellants,

vs.

Hawaiian Oke and Liquors, Ltd.,

Appellee.

USDC HAWAII
No. 2418

Upon Appeal from the United States District Court for the District of Hawaii

JOINT REPLY BRIEF ON BEHALF OF APPELLANTS

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

Subject Index

IV

V

Table of Authorities Cited

Cases

Rules

No. 22,162

IN THE

United States Court of Appeals

For the Ninth Circuit

JOSEPH E. SEAGRAM AND SONS, INC., THE HOUSE OF SEAGRAM, INC., McKESSON AND ROBBINS INCORPORATED, BARTON DISTILLING COMPANY and BARTON WESTERN DISTILLING CO., *Appellants,* vs. HAWAIIAN OKE AND LIQUORS, LTD., *Appellee.*	USDC HAWAII No. 2418

Upon Appeal from the United States District Court for the District of Hawaii

JOINT REPLY BRIEF ON BEHALF OF APPELLANTS

ARGUMENT

I

INSUFFICIENCY OF EVIDENCE TO SUPPORT THE VERDICT

A. Lack of evidence of agreement between Seagram and Barton precludes application of Per Se Rule

Plaintiff does not dispute that a horizontal agreement is necessary for a group boycott and that the jury would have had to find either an agreement between two or more Seagram divisions or between Seagram and Barton to impose per se liability. The divisions of Seagram cannot conspire among themselves (Op. Br. pp. 13-26), hence a finding of conspiracy between Seagram and Barton is essential to sustain the verdict.

1. Plaintiff's version of the facts

Plaintiff, while admitting from the start (Tr. I: p. 22) that no one at Barton ever communicated with or agreed with any one at Seagram, argues that concerted action can be inferred from the ''totality'' of the circumstances. These are discussed below.

a. Calvert's ''repeated commendation'' of Hawaiian Oke

Calvert ''repeatedly complimented'' Hawaiian Oke for its performance, says plaintiff, and this was a significant factor supporting the conclusion that Calvert changed for reasons other than dissatisfaction (Br. pp. 16-17; 42-43).

The statement (Br. p. 16) that Arthur Murphy ''repeatedly complimented'' Hawaiian Oke (citing Exhibits P-49 and P-60 and Tr. 2660) is false. The references are to a *form* letter mailed to plaintiff along with every other distributor in the country thanking them for their contribution to the resurgence of Calvert.

The form letter hardly supports the assertion that Murphy ''repeatedly complimented'' Hawaiian Oke. No record reference is cited to support it.[1]

Plaintiff then says (Br. p. 16) that Gonzales noted ''significant improvement'' in Hawaiian Oke and that it was doing a good job, citing Tr. 1659. What Gonzales said was that only after he came to Hawaii to help Hawaiian Oke (at large expense to Seagram) was there any improvement. He testified:

> Well, you know when you use percentages, if you are selling one case and you sell two, you know that is 100 percent increase. So, percentagewise, I suppose the increase was quite large. Casewise, from the standpoint of the number of cases, it still was, you know, still not much (Tr. IV: 1659.)

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[1]Rule 3 of this Court imposes this duty on appellee. See also, *Lange v. Curtin,* 11 Cal.App.2d 161, 165, 53 P.2d 185, 186 (1936).

This was not evidence of a "significant improvement."

Again, plaintiff says (Br. p. 17) that Novak of Calvert "expressed approval" of Hawaiian Oke's job. Novak said:

> I was highly unsatisfied with the progress we were making with Calvert Extra. This was our primary line and we were well behind quota on Calvert Extra, which is the mainstay of our entire business. (Tr. 1260.)

Exhibit M-39, a letter from Novak, said:

> . . . we are in good shape on Calvert Gin . . . but we are far behind on Calvert Extra. (Tr. 2580.)

To call this "repeated commendation" makes a mockery of this record.

Plaintiff's total case sales had improved. This does not suggest that Calvert was satisfied. Calvert sales everywhere in the country had boomed. Plaintiff admitted that Calvert had complained and that its distribution was poor (Tr. II: 457; 458; 616-618; V: 2133-2135). Following the letter of "commendation," Novak expressed dissatisfaction with Calvert performance (Ex. M-32) which Wong admitted (Tr. V: 2133).

Plaintiff admits (Br. p. 35) that Calvert originally approached McKesson to discuss a change. No explanation was suggested why it did so if it were "happy" with plaintiff. It is impossible to conclude that Calvert approached McKesson for any reason other than dissatisfaction with Hawaiian Oke. No other finding has support in the evidence.

b. McKesson's failure to consider lines not carried by Hawaiian Oke

Plaintiff says that McKesson sought only lines carried by Hawaiian Oke which is a suspicious circumstance supporting an inference of a conspiracy. Referring to the June meeting, it says:

> Significantly, all of the lines then discussed were distributed by appellee, Hawaiian Oke. (Br. p. 8.)

This is false. Maloney (McKesson) testified that Christian Brothers and a beer line were discussed (Tr. 674). Hawaiian Oke carried neither (Tr. II: 352; Tr. I: 295-296).

Plaintiff further says that McKesson never considered other lines. (Br. p. 36.)

Again, a bald misstatement. Maloney approached Alfred Fromm and Jack Welsch of Fromm & Sichel to solicit the Christian Brothers line (Tr. II: 724-725; Ex. P-72). Cotler of McKesson solicited Browne Vintners line, but was unsuccessful (Tr. II: 371).

In the light of the record, plaintiff's statements are astounding.

c. The Barton Products Mix

Barton was dissatisfied because plaintiff sold too much "white goods" in relation to more profitable "brown goods." Plaintiff says brown goods "were increasing both proportionately and in volume" (Br. p. 18). Barton never complained about volume. Plaintiff's assertion is a clear distortion. It cites Exhibit P-19 which shows sales by Hawaiian Oke.[2]

Year	Brown Goods Cases Sold	White Goods Cases Sold	Brown Goods Percentage	White Goods Percentage
1962	1975	1310	60.1	39.9
1963	2050	1732	54.2	45.8
1964	2843	3305	46.2	53.8
1965 (Jan-Aug)	1907	2050	48.2	51.8

[2]Plaintiff stated that it had verified the data as to Exhibit P-19, Barton's second set of interrogatories (Tr. II: 525). These figures have been translated into graph form in Exhibit B-57.

Thus, the ratio of brown goods sold dropped from 60% to 46% from 1962 through 1964 and made a slight recovery in early 1965. The evidence is uncontradicted that when Barton made the change, the ratio had declined sharply from previous years. A finding that Barton was satisfied with the product mix cannot be supported.

d. Barton's dissatisfaction with plaintiff's delinquency in paying bills

Barton had been so concerned about plaintiff's slowness in paying its bills that from 1963 to 1965, it wrote many letters to plaintiff expressing its concern, and had already on October 9, 1963, decided to "make a jobber change" when the opportunity presented itself. (Ex. B-34; Op. Br. pp. 5-6.)

2. Irrelevancies relied on by plaintiff to support a finding of conspiracy

Plaintiff attempts to support a finding of conspiracy by creating the impression that the formation of Portside was an abnormal business practice surrounded by suspicious circumstances. It argues that this, coupled with the parallel behavior of Barton and Seagram, comprise the "totality" of facts from which an inference of conspiracy could be drawn.

Several "suspicious" circumstances are not borne out by the record, others are irrelevant. To create a suspicion, plaintiff raises questions about aspects of the case on which there is no dispute, apparently in the belief that by asking a question, one can create doubt where none exists.

a. Intracorporate conspiracy

While claiming that the error was harmless and moot, plaintiff dwells at length on the evidence of intracorporate conspiracy. The sufficiency of the evidence on this issue has not been argued, but we say that agreements among the Seagram divisions are not proscribed (Op. Br. pp.

13-20) and that an agreement between The House of Seagram and Joseph E. Seagram and Sons, Inc. is lawful in the absence of an unreasonable restraint, of which there was no evidence here (Op. Br. pp. 27-36).

b. Uniqueness of McKesson's second house

Plaintiff tries to raise suspicion by asking why McKesson would open a second house in Hawaii when it had not done so before (Br. p. 37). It had answered this question earlier saying Calvert "would be understandably reluctant to have its line—which competes directly with '7-Crown' and 'V.O.'—distributed by the same wholesaler" and "McKesson likewise preferred . . . separate houses for the distribution of these competing lines" (Br. p. 6).

There is nothing suspicious about this. The reason was never in dispute. Plainly, no inference of conspiracy could be drawn from this; nor can it be tortured into a "suspicious" factor to be considered in the "totality" of the evidence to warrant an inference of conspiracy.

c. Portside's incomplete staff

The fact that the staff for Portside was not complete at the time of the change is no evidence from which one can infer Seagram-Barton collaboration. If McKesson were an unknown quantity, it might raise a question, but McKesson was distributor for both Barton and Seagram on the mainland. Both were acquainted with its executive personnel and operations (Tr. II: 766; IV: 1439). Murphy testified that McKesson had been successful in handling Calvert products (Tr. IV: 1439). Hence, there is nothing unusual in relying on McKesson to staff its new house. If any inference could be drawn, it is that Barton and Seagram were both so dissatisfied with Hawaiian Oke that they were willing to change even before the staff of Portside was set.

d. The secret negotiations

Plaintiff dwells on the fact that the negotiations on the formation of Portside were carried on unknown to plaintiff. There is nothing suspicious about this. It would be strange if it were otherwise. See, *e.g.*, *Ace Beer Distributors v. Kohn, Inc.*, 318 F.2d 283 (6th Cir. 1963), cert. denied 375 U.S. 922. Moreover, even if one could legitimately criticize the parties for not informing Hawaiian Oke of the possible loss of lines, the failure to disclose it earlier in no way logically suggests a concert of action between Barton and Seagram. This is another "make-weight" used by plaintiff in its attempt to create a "totality" of suspicious circumstances where none exist.

e. The Kauhane memo

As "evidence" of a Seagram-Barton connection, plaintiff points to Exhibit P-71. This is an intra-office McKesson memo from Kauhane to Maloney in which Seagram, Barton and other lines are mentioned. A note on the memorandum suggests that Maloney "clear the whole matter with Seagram & General Wine."

This memo is not admissible as against Seagram or Barton in the absence of independent evidence establishing, prima facie, that they were members of a conspiracy. *Standard Oil of California v. Moore*, 251 F.2d 188, 210 (9th Cir. 1958), cert. denied 356 U.S. 975. None was produced.

Even if admissible, it fails to prove any Seagram-Barton connection. Whatever inferences one can draw from the memo, one cannot logically conclude that any agreement, express or tacit, existed between the two suppliers. At most, it shows that Seagram may have known that Barton was one of the several lines being considered by McKesson. One might also infer that McKesson was

seeking an assurance from Seagram that it would not object to any of the proposed lines. McKesson already knew that an objection had been raised to placing Calvert and 7-Crown in one house. That Seagram had no objection to the presence of Barton or other lines mentioned in no way tends to prove any agreement or mutual understanding with Barton.

The questions raised by plaintiff (Br. pp. 37-38) not already discussed, all relate the intracorporate aspect of the case and in no way establish any link between Barton and Seagram. What plaintiff's case boils down to is McKesson's "plan" and the parallel action by Seagram and Barton.

3. Inapplicability of Interstate Circuit

Absent proof of an agreement between Seagram and Barton, plaintiff relies on *Interstate Circuit, Inc. v. United States,* 306 U.S. 208 (1939) and its progeny (Br. pp. 38-44).

The "plans" referred to in *Interstate Circuit, United States v. Paramount Pictures,* 334 U.S. 131 (1948), *United States v. United States Gypsum Co.,* 333 U.S. 364 (1948), and *United States v. Masonite Corp.,* 316 U.S. 265 (1942) are all distinguishable.

a. Complex and elaborate parallelism

The cases cited by plaintiff involved complex and elaborate plans. There the defendants entered into detailed agreements containing identical terms of pricing and other practices. As we pointed out (Op. Br. pp. 22-23), where the situation permits a variety of possibilities, but where the defendants' actions are nonetheless identical, logic and common sense permit the conclusion that the result was reached by agreement. Cf., *Delaware Valley Marine*

Supply Co. v. American Tobacco Co., 297 F.2d 199 (3d Cir. 1961), cert. denied 369 U.S. 839.

Here, the situation did not permit much scope of action to Barton and Seagram. They could either go with Portside or stay with Hawaiian Oke. That both left is insufficient to establish a conspiracy.[3]

b. High degree of pervasiveness

The conduct in *Interstate Circuit* and similar cases also differs from that here in its pervasiveness. In those cases, numerous competitors adopted identical practices. The more participants, the less likely that identical action resulted from independent decision.

Here, two suppliers decided to change distributors. To permit a jury to find that such action was based on agreement is to permit a verdict based solely on speculation.

c. Anticompetitive motives

In each of the *Interstate Circuit* type cases, the participants all had anticompetitive motives for participating. The only motive here of either Seagram or Barton was to get a better distribution.

In *First National Bank of Arizona v. Cities Service Co.*, ... U.S. ...., 20 L.E.2d 569 (May 20, 1968), the Court affirmed summary judgment for the defendant although the plaintiff had relied on *Interstate Circuit* to establish a concerted refusal to deal. As here, plaintiff *had introduced evidence other than the simple refusal to deal* which it claimed showed suspicious circumstances and which

[3]Plaintiff's attempt to distinguish the *Delaware Valley* case (Br. p. 43) is fallacious. There the suppliers could have said, "I will refuse to deal with plaintiff if the others do likewise." The question, as in every parallel behavior case, was whether a jury finding to that effect was warranted by the circumstances surrounding the particular conduct. The Court held it was not. The directed verdict was affirmed.

coupled with the parallel behavior allegedly justified the inference of concerted action. 20 L.Ed.2d 587-589. It was also able to show that *a plan to boycott the plaintiff did exist, that the defendant had been invited to participate,* and that the defendant thereafter did refuse to deal with the plaintiff.

The Court reviewed the so-called suspicious circumstances and found that, as is the case here, the evidence was "not reasonably susceptible to the interpretation sought to be placed on it by petitioner." 20 L.Ed.2d 589. Left then only with the invitation to participate in the plan and the parallel refusal to deal, the Court distinguished *Interstate Circuit:*

> The reason that the absence of direct evidence of agreement in *Interstate Circuit* was not fatal is that the distributors all had the same motive . . . Here (the plaintiff) is unable to point to any benefits to be obtained by (the defendant) from refusing to deal with him and, therefore, the inference of conspiracy sought to be drawn from 'parallel refusal to deal' does not logically follow. (20 L.Ed.2d 591.)

Here plaintiff pitched its entire argument to the jury and to this Court on the theory that Seagram and Barton had no good business reasons for terminating their distributorships. It failed to produce any evidence that anticompetitive motives prompted their actions, relying instead on their parallel behavior. However, as the Court stated in *Cities Service:*

> . . . (T)o suggest, as petitioner does, that (defendant's) participation in the conspiracy is shown by its failure to deal with him is itself to rely on motive. (20 L.Ed.2d 587.)

The only motive the jury could have found in this case was a desire to gain better distribution. However, unlike the anticompetitive motives in *Interstate Circuit,* such a

motive is consistent with independent decision. Therefore, as the Court held in *Cities Service:*

> . . . (T)he inference that (defendant's) failure to deal was the product of factors other than conspiracy (is) at least equal to the inference that it was due to conspiracy, thus negating the probative force of the evidence showing such a failure. . . . (20 L.Ed.2d at 587.)

In *Cities Service,* the plaintiff argued that he was not obliged to show *why* the defendant conspired, only that it *did.* The Supreme Court, while granting this was true enough where a conspiracy was shown, ruled that it was necessary to show motive where the plaintiff was trying to prove the existence of a conspiracy by circumstantial evidence consisting of parallel refusals to deal. (Id. at 586-587.)

d. Cooperation of participants essential to success of plan

In the *Interstate Circuit* variety of cases, the success of the plan depended on the participation of all the defendants. As the Court pointed out in *Cities Service,* it was only because the cooperation of all was assured that the participants could afford to raise their prices without the risk of loss of business to competitors. Id. at 591.

Here, as we pointed out (Op. Br. pp. 25-26), no evidence supports the conclusion that the establishment of Portside depended on Barton. Thus, the element of interdependence was completely lacking.

e. Consciousness of commitment

As we also pointed out (Op. Br. pp. 25-27), the *Interstate Circuit* doctrine does not apply unless there is proof of some consciousness of commitment by the participants to each other. Plaintiff ignores *Klein v. American Luggage Works, Inc.,* 323 F.2d 787 (3d Cir. 1963) and *United*

States v. Standard Oil Co., 316 F.2d 884 (7th Cir. 1963) evidently realizing that its theory simply cannot be squared with these holdings.

f. Restraint of trade an essential feature of the plans

The plans in the *Interstate Circuit* type cases involved naked restraints of trade. It was evident to every participant that a restraint of trade was called for. *Interstate Circuit, United States Gypsum, Masonite* and *Paramount* involved price fixing. *Milgram v. Loew's, Inc.*, 192 F.2d 579 (3d Cir. 1951), cert. denied 343 U.S. 929 and *Wm. Goldman Theatres v. Loew's, Inc.*, 150 F.2d 738 (3d Cir. 1945) were naked attempts to destroy competitors.[4]

Here, there is no evidence that non-dealing with Hawaiian Oke was a requirement for establishing Portside. There is no evidence that it mattered to Seagram or Barton whether the other continued to deal with Hawaiian Oke or dealt exclusively with McKesson. Splitting of lines and dual distribution had occurred before (Tr. I: 163-164; IV: 1458; VI: 2324). This was something each supplier worked out on its own with McKesson.

B. An agreement between Seagram and Barton to participate in the formation of Portside is not a group baycott

Plaintiff contends that the evidence sustains a finding that Seagram and Barton made their participation in Portside conditional on the participation of the other. Although the evidence does not support this, we have shown in our opening brief (pp. 27-36) that assuming, *arguendo*, that such an "agreement" was proved, it does not constitute a "group boycott" or a "concerted refusal to deal."

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[4] *Milgram* and *Wm. Goldman* must be read in the light of *Delaware Valley* and *Klein*, subsequent Third Circuit cases, and *Theatre Enterprises, Inc. v. Paramount Film Distributing Co.*, 346 U.S. 537 (1954).

In response, plaintiff simply puts forward the proposition that good business reasons do not save a concerted refusal to deal. In this circular argument, plaintiff assumes that "group boycott" and "concerted refusal to deal" are self-defining terms. The fallacy is obvious.

1. Discriminatory and exclusionary boycotts

An agreement to establish a common distributor is not a concerted refusal to deal, even though non-dealing with others results.

If Seagram and Barton had agreed to refuse to deal with Hawaiian Oke, they may not avoid liability by showing good motives. But if they decide to use Portside, and do not single out Hawaiian Oke for non-dealing, there is no boycott. It is no more an agreement to refuse to deal with Hawaiian Oke than to refuse to deal with any other distributor.

Similarly, it was not an attempt to exclude others from the market. Cf. *Radiant Burners, Inc. v. People's Gas Co.,* 364 U.S. 656 (1961).

Concerted action similar to that alleged here was found not to constitute a group boycott in *Instant Delivery Corp. v. City Stores Co.,* 1968 Trade Cases ¶ 72,454 (E.D. Pa. 1968). There, four retailers agreed to use a particular delivery service. A competitior of the service selected claimed a group boycott, citing *Klor's.* The court rejected its argument, stating:

> In the case at bar, the only "refusal to deal" with (plaintiff) was that inherent in the selection of some other carrier to perform the consolidated delivery service.
>
> . . . I find nothing in this record to evidence an intent to discriminate against or exclude (plaintiff). (1968 Trade Cases at pp. 85, 443.)

No case cited by plaintiff holds that the selection of a joint distributor constitutes a concerted refusal to deal. In every case, either someone has been singled out for non-dealing or the agreement has been an attempt to exclude others from the market.

> *Fashion Originators' Guild v. F.T.C.*, 312 U.S. 457 (1941);
>
> *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951);
>
> *Associated Press v. United States*, 326 U.S. 1 (1945).

Continental Ore Co. v. Union Carbide & Carbon Co., 370 U.S. 690 (1962) was a classic exclusionary boycott.

United States v. Trenton Potteries Co., 273 U.S. 392 (1927) and *United States v. Columbia Steel Corp.*, 334 U.S. 495 (1948) did not concern group boycotts. Other cases cited by plaintiff are discussed in our opening brief (p. 29).[5]

2. Requirement of non-dealing

In every case cited by plaintiff where the conduct was found to constitute a group boycott, the agreement, by its terms, required non-dealing, and the objective of each agreement was to withhold trade from others. In no case was the non-dealing an incidental result.

Here there is no evidence that non-dealing with Hawaiian Oke was required. As far as Barton and Seagram were concerned, each was free to work out whatever arrangement it wanted with McKesson.[6]

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[5]It should be noted that plaintiff has ignored the cases cited at pp. 30-31 of our Opening Brief.

[6]Barton obviously would have supplied plaintiff with private label products (on satisfactory credit terms) just as it did with McKesson while plaintiff was its general distributor. (Tr. I: 1517.)

Thus, the evil of a real "concerted refusal to deal," denounced in *Klor's Inc. v. Broadway-Hale Stores*, 359 U.S. 127 (1959) is not present here.

3. Plaintiff's "Fait Accompli" argument

The argument that Hawaiian Oke is defenseless to protect itself because it was presented with a *fait accompli* is a sham issue. The same result would have occurred whether or not Seagram and Barton made their decisions independently. Whether Hawaiian Oke is presented with a *fait accompli* in no way turns on whether there was a mutual understanding or true parallel action.

Plaintiff's statement that the terminations occurred with "lightning like speed" (Ans. Br. 25) is not true. The Seagram lines continued for a month after notice (Tr. I: 153; Exs. S-10, 11, 12) and the Barton lines remained for almost two months (Tr. I: 180, 182).[7]

4. Non-dealing not the object

The quotation from *General Motors* (plaintiff's brief, p. 47) illustrates another distinction between a concerted refusal to deal and an agreement to establish a common distributor. There, the Supreme Court stated:

> . . . where businessmen concert their actions *in order to* deprive others of access to merchandise . . . we need not inquire into the economic motivation underlying their conduct. . . . (emphasis added.)

There is no evidence that Seagram and Barton had any understanding *in order* to deprive Hawaiian Oke of access to their products. If they agreed to anything (there is no evidence they did), it was to go with Portside and

[7]Plaintiff made no effort to secure replacement beyond two calls to friends in California, which were not pursued. (Tr. I: 289-303.)

get a better distributor. There was no intent to injure or coerce Hawaiian Oke.

5. Characteristics of group boycotts not present

In the agreement claimed here no particular trader or group was singled out for non-dealing. There was no attempt to exclude others from the market. It did not require the parties to refuse to deal with others. It did not restrict the freedom of the parties to trade at any time with whom they wish. It involved no plan to fix prices or monopolize. There was no anticompetitive element.

Conceivably an agreement to establish a common distributor might constitute an unreasonable restraint of trade. This would depend on the purposes of the agreement and the effects thereof on the marketplace. Cf., *United States v. Paramount Pictures, supra; United States v. Columbia Steel Co., supra* at 524-525. To condemn such an agreement as a concerted refusal to deal, however, cripples the freedom of traders to arrange adequate distribution, prevents the entry of newcomers into the market and virtually assures the continuation of the status quo. It rewards distributors who might be lazy, incompetent or dishonest. It defeats competition.

If, as plaintiff contends, the new house needed a well-rounded group of lines, it is both reasonable and consistent with legitimate competition for McKesson to seek conditional commitments. It would be reasonable for Barton and Seagram to want to know what other lines the new house would handle.

A "plan" of the kind claimed here must be tested by the rule of reason rather than be struck down by a mechanical application of the "group boycott" label.

II

THE COURT ERRED IN THE ADMISSION AND REJECTION OF EVIDENCE ON LIABILITY

A. The Friedman statement

Ted Wong was allowed to testify that Sheldon Friedman of Barton "guessed" that the change of distributors might have been due to "deals" between Seagram and McKesson. A more inflammatory statement to a jury in an antitrust case can hardly be imagined. Plaintiff claims this was admissible to show Friedman's state of mind. It argues that it tends to show that Barton did not terminate for good business reasons, since Friedman could not think of one when asked.

Under this theory, the only relevant factor is Friedman's lack of knowledge. His "guess" adds nothing to what the jury already had when Wong testified, ". . . he told me he didn't know" (Tr. I: 167). Once Friedman said he didn't know, any speculations he thereafter makes have no probative value. Allowing Wong to testify as a Friedman's speculations was plain error and highly prejudicial.[8]

The prejudice is highlighted by plaintiff here (Br. pp. 18-19, 37) by referring to it as "Friedman's state of mind 'European deal' admission" (Br. p. 37). In no sense was the reference to a "European deal" an admission. If plaintiff were simply trying to show Friedman's state of mind, the reference should have been to Friedman's inability to give a good business reason, not to his "European deal" admission. This was precisely how the jury was misled on the issue of conspiracy.

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[8]Had the court sustained defendants' objection, that part of Friedman's testimony guessing about a European deal between Seagram and McKesson would not have reached the jury's ears (see Tr. I: 167-168).

The court's instruction does not cure the error because it too was erroneous. In *Spencer v. Texas,* 385 U.S. 554 (1967), cited by plaintiff, the evidence was admissible for one purpose but not another, and the court gave the proper instruction. Here, the speculations were admissible neither for their truth nor for Friedman's state of mind.

The statement of this Court in *Flintkote Company v. Lysfjord,* 246 F.2d 368 (9th Cir. 1957), cert. denied 355 U.S. 835 (1957) is apposite in referring to the erroneous admission of hearsay on the alleged conspiracy:

> The full effect of this evidence on the jurors' minds cannot be measured with precision. To deny that it influenced the jury's verdict in a material manner is to ignore reality. (p. 386.)

Accord:

Beck v. Wing's Field, Inc., 122 F.2d 114 (3d Cir. 1941);

Farris v. Interstate Circuit, Inc. 116 F.2d 409 (5th Cir. 1941).

Contrary to plaintiff's assertion, this testimony was the only evidence suggesting any possible improper motive in the entire case. Although it labels this contention "astounding," (Br. p. 58), the court will note the absence of any record reference to any other evidence of improper motive.

B. Evidence of Portside's performance after the change in distributors

Plaintiff argues (Br. p. 59) that the evidence of Portside's 1966 performance was introduced not to show that defendants should have known that Portside would do a poor job, but to show that Hawaiian Oke was doing a good one. No matter how plaintiff phrases it, this evi-

dence was simply an attempt to second-guess Seagram and Barton.

The question is: What was the situation in June 1965? The figures for 1966 of course were not on hand. The record is uncontradicted that Calvert had complained about the poor sales performance of Calvert Extra, its most important product, and about the distribution of the product, particularly on the outer islands. It is likewise uncontradicted that the Barton ratio of brown to white goods had fallen off from approximately 60-40 in 1962 to 48-52 in 1965. Barton had complained of plaintiff's chronic delinquency in paying bills as far back as 1962 and in October 1963 had decided to make a jobber change (Op. Br. p. 5). These were the facts that were available to the suppliers in 1965.

None of the cases cited by plaintiff (Br. p. 60) supports admission of the 1966 Portside data. In each, evidence of prior or subsequent acts of the defendants was admissible to show a continuing combination, a common design, or monopolistic or conspiratorial intent and purpose. None sanctioned a comparison of the sort received in evidence here.

Obviously, the fact that Portside did not do well in 1966 does not tend to prove that Hawaiian Oke was doing well in 1965. The evidence was irrelevant and served only to mislead and prejudice the jury.

III

ERRORS IN INSTRUCTIONS ON LIABILITY

A. Unincorporated divisions of a single corporation cannot conspire among themselves

1. The intracorporate conspiracy issue is not moot

Plaintiff argues that the question whether intracorporate divisions can conspire among themselves is moot because the jury returned a verdict against all defendants (Br. pp. 91-92). This contention is without merit.

Under the trial judge's instructions, the jury did not have to find any agreement between Seagram and Barton to impose liability on both. The jury was instructed:

> One who knowingly joins an existing conspiracy or combination is charged with the same responsibility as if he had been one of the originators or instigators of the conspiracy.
>
> . . . It is not necessary to a conspiracy that all of the conspirators be a part of the conspiracy from the beginning. A person may join a conspiracy after it has been agreed upon. (Tr. 3211-12.)

The jury had previously been instructed:

> Nor would it be a defense that the parties defendant may have believed what they were doing was legal. This is because the law provides that combinations or conspiracies involving a refusal to deal cannot be excused even for legitimate business reasons. (Tr. 3208.)

With these instructions, the jury could have imposed liability under the theory that the three Seagram divisions agreed among themselves to change to McKesson and that Joseph E. Seagram and Barton thereafter joined the "conspirary."[8a] Under this theory, the divisions question is crucial. If combination among the

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[8a]Such a finding has no support in the evidence.

divisions is illegal and Barton learns of it, then innocent parallel behavior is transformed into "knowingly joining an existing conspirary." Under the instructions, Barton's unawareness of the illegality of the "combinaton" does not save it from liability.

Because the general verdict many have rested on a "conspiracy" among the divisions, reversal is required. *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.,* 370 U.S. 19 (1962).

2. Conspiracy among the divisions: The merits

Plaintiff makes the Alice in Wonderland argument that although the divisions of The House of Seagram have no independent legal existence, they must be treated as though they did if they normally compete with each other for sales. It makes the flat assertion that a decision to foster intracorporate competition "bears certain consequences under the antitrust laws." (Br. p. 96.) No case so holds. *United States v. Yellow Cab Co.,* 332 U.S. 218 (1947) and *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.,* 340 U.S. 211 (1951), cited by plaintiff, concerned separate corporations affiliated under common ownership.

In another case holding corporate subsidiaries liable under Section 1, government counsel conceded that if there had been only one corporation with intracorporate departments, " . . . that would not be a conspiracy. You must have two entities to have a conspiracy." *Timken Roller Bearing Co. v. United States,* 341 U.S. 593, 606 (1951).

The Supreme Court has recently emphasized this:

> But since respondents . . . availed themselves of the privilege of doing business through separate corporations, the fact of common ownership could

> not save them from any of the obligations that the law imposes on *separate entities.* (emphasis supplied)
> *Perma Life Mufflers, Inc. v. International Parts Corp.,* .... U.S. ...., 88 S.Ct. 1981, 1986 (June 10, 1968).

The Sherman Act was never intended to apply to intracorporate agreements. Section 8 states that "person" shall include corporations and associations; it does not say intracorporate divisions.

Moreover, the trial court's novel ruling in no way furthers antitrust policy. As pointed out (Op. Br. p. 20), Section 2 of the Act subjects activity by a single corporation to antitrust sanctions. Had Congress intended the Act to apply to agreements among directors, employees and internal divisions of a single corporation in the absence of conduct proscribed by Section 2, it would have said so in Section 1.

Plaintiff refers to the "market power" of the "combination" (Br. 96). This is another false issue. If the decision-making power were vested in a single executive of The House of Seagram, the effect on plaintiff would be no different. That decisions are normally made autonomously adds nothing to Seagram's market power. If the power is excessive, the remedy is Section 2. Monopoly was charged in the complaint but abandoned.

Plaintiff (Br. p. 93) tries to distinguish *Nelson Radio & Supply Co. v. Motorola, Inc.,* 200 F.2d 911 (5th Cir. 1952), cert. denied 345 U.S. 925 (1953) and *Poller v. Columbia Broadcasting System, Inc.* 284 F.2d 599 (D.C. Cir. 1960) rev'd. on other grounds 368 U.S. 464 (1962) as being applicable only to an agreement between a corporation and its division rather than between the divisions themselves. It fails, however, to explain the significance of this distinction.

Obviously there is none. The crux of those decisions is that unincorporated divisions have no separate identity apart from the corporate entity of which they are branches.

Plaintiff emphasizes that consultation between the divisions was a departure from normal procedure (Br. p. 3) but it does not explain how this rises to the level of an antitrust violation.[9] Normally the managers of the departments of a large retail department store would not consult each other on marketing problems, but this should not prevent them from doing so if a problem of mutual interest arises. There is no reason why the fact that the products of a single corporation are normally marketed by different groups of employees should convert intracorporate consultation into a Sherman Act offense.

Plaintiff is groping for some theory of estoppel. However, as we pointed out in our opening brief (p. 18), Hawaiian Oke was not misled into believing that it was dealing with three independent entities. Every bill ever received was from The House of Seagram, Inc. In any event, the issue of deception was never raised, and if it had been, it would have been a question for the jury rather than the trial judge.

Even if we amend the Sherman Act to read that an intracorporate division is a "person," plaintiff's suggested test for determining independence is wrong. It contends that since the only activity under attack is sales, all other corporate functions are immaterial (Br. pp. 95-6). Thus, while arguing that defendants' activities

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[9]Plaintiff pressed this untenable argument on the trial judge who accepted it and included the proposition in his post verdict opinion (Op. Br. pp. 16-18).

must be viewed in their "totality" in determining if an offense was committed (Br. p. 31), it says that Seagram's functions must be compartmentalized in determining if the divisions are "separate entities."

Sales do not exist in a vacuum. Other factors—overhead, payroll, accounting, advertising and the ability to obtain raw materials—all affect pricing and marketing decisions. These factors, plus the fact that the divisions do not have limited liability and that the assets of the entire House of Seagram are available to anyone with a claim against any of the divisions, the fact that personnel are freely shifted from one division to another, the fact that all employees are paid from the same treasury, the fact that all divisions use the same contract, and one bookkeeping department handles all billing would be relevant in determining whether the divisions are "separate entities." To ignore them ignores reality.[10]

Plaintiff says that the antitrust laws are concerned with substance, not form. We agree. From any common sense, practical standpoint, The House of Seagram is one business, not three or four. Despite the fact that the divisions try to outperform each other, the personnel of the divisions all work for the same company. Their futures depend on the success of that company. To adopt plaintiff's theory would forbid a large corporation from organizing in such a way as to carry on business as a unified enterprise while still preserving some autonomy in the intracorporate decision-making process.

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[10]Plaintiff's statement (Br. p. 96) that our description of the Seagram structure is outside the record is untrue. See references (Op. Br. p. 15). Statements without record references are legal consequences.

The necessary consequence would be to centralize all intracorporate decision-making. This would not further antitrust policy but would saddle large corporations with inefficient and archaic internal structures. *Yellow Cab* and similar cases should not be extended, *reductio ad absurdum,* to reach such a result.

B. A parent corporation may lawfully instruct its wholly owned subsidiary to change distributors

The court told the jury to impose liability if it found that Joseph E. Seagram and Sons, Inc. induced any of the unincorporated divisions of The House of Seagram to initiate or join a "combination or conspiracy" to terminate Hawaiian Oke and establish Portside. The court instructed the jury that participation in a plan knowing the consequence of which was to restrain trade was sufficient to establish a conspiracy. (Tr. VIII: 3212.)[11]

Thus the jury was permitted to impose liability without finding an unreasonable restraint of trade, if it found that Joseph E. Seagram and Sons, Inc. induced the three divisions to participate in McKesson's formation of Portside. There was no requirement in the charge that Seagram be aware of Barton's participation.

If Barton, on learning of Seagram's "unlawful" conduct, also participated in the "plan," it thereby joined the conspiracy and was liable too (see Point II-A *supra).*

We do not quarrel with the instructions on knowingly joining an existing conspiracy. Cf. *Flintkote Co. v. Lysfjord, supra* at 375. Nor with the proposition that under certain circumstances, a conspiracy may be found to exist between a parent corporation and its wholly owned

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[11]The jury was told that the word "parties" as used in the court's charge included the unincorporated divisions as well as The House of Seagram, Inc. and Joseph E. Seagram and Sons, Inc.

subsidiary. Cf., *First National Bank of Arizona v. Cities Service, Inc., supra.* We do, however, take issue with the proposition that it is, without more, an offense under the Sherman Act for a parent corporation to direct or advise three unincorporated divisions of its wholly owned subsidiary to change distributors.

It is important to note that the jury was not required under these instructions to find a combination between or among the divisions themselves. Per se liability could thus have been imposed absent a finding of any horizontal agreement. As we pointed out, this goes beyond any group boycott case and is without precedent (Op. Br. pp. 44-45).

Plaintiff's only answer, other than arguing it is harmless error and moot (Br. pp. 91-96), is to cite *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., supra* and *United States v. Yellow Cab Co., supra.* Neither is authority for imposing per se liability under the circumstances present here. *Kiefer-Stewart* was a horizontal pricefixing combination between two wholly owned subsidiaries, and *Yellow Cab* involved a far-flung vertical and horizontal conspiracy to monopolize.

More in point is *Alpha Distributing Co. v. Jack Daniel Distillery,* 207 F.Supp. 136 (N.D. Cal. 1961), aff'd 304 F.2d 451 (9th Cir. 1962). There the court denied a preliminary injunction based on the contention that a change of distributors by the subsidiary at the request of or in concert with the parent corporation was a per se Sherman Act violation. The court stated:

> . . . it is doubtful that mere concert of such affiliates for the purpose of exercising their right, as a single business unit, to . . . select a chosen distributor, and nothing more, constitutes a per se violation . . . there should be a showing either that the defendants were not acting as a single business

> unit, or if they were, that any restraint of trade resulting from their action was in fact unreasonable. (Pp. 137-138.)

Here no evidence shows that in selecting the Hawaii distributor, the parent and its wholly owned subsidiary were acting other than as a single business unit. The parent marketed its products through its subsidiary. Since at the time in question there was no president of The House of Seagram,[12] it was natural for the parent to convey its suggestions to the subsidiary through the personnel of the several divisions.

The court's instruction permitting the jury to impose per se liability under these circumstances was a gross misapplication of the law.

C. Selection by Seagram and Barton of Portside as a common distributor not a group boycott

Plaintiff evades the question whether the defendants' alleged conduct constitutes a group boycott. It argues that because the court instructed the jury that a "plan" to terminate Hawaiian Oke was illegal per se, the instruction was correct (Br. 49-51). In so doing, it fails to come to grips with the question whether a decision to use Portside as a common distributor that results in the termination of Hawaiian Oke should be treated differently from a "plan to terminate" Hawaiian Oke.

An agreement between two suppliers whereby each agrees not to deal with a particular distributor is on its face a naked restraint of trade. Such an agreement is illegal per se and cannot be saved by showing good motives.

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[12]Sichel had been president previously, but no one had been elected to replace him (Tr. III: 948).

But an agreement to use a common distributor is not a naked restraint of trade. Here both suppliers had used plaintiff as their distributor. But what would be the result if Barton had previously used another, such as Johnston & Buscher? If Barton was dissatisfied and, in order to make the new house possible had agreed with Seagram to participate in its formation, would such conduct be illegal per se? As a result of such an understanding Seagram would terminate its dealings with Hawaiian Oke, Barton would terminate its dealings with Johnston & Buscher, and both would "refuse to deal" with anyone but Portside. Obviously, this could not be a group boycott of Hawaiian Oke and Johnston & Buscher.

If this is so, why should the fact that Seagram and Barton happened to use the same distributor change the result? This would mean that while suppliers who used different distributors could participate in the formation of a new one, those who used the same distributor could not.

Here, McKesson, an established concern, became the distributor for both. But if the per se theory is accepted, it would apply with equal force to any newcomer attempting to break into the market. If Seagram and Barton are dissatisfied with Portside and are solicited by a newcomer, they would be barred from participating in the formation of a new house. Plaintiff's theory would inevitably result in freezing the industry in status quo.

Plaintiff urges that the new house *could not have been formed* without the participation of both Seagram and Barton. It says that their decision could not have been made independently because neither would have been so foolish to commit its own lines to McKesson without knowing what other lines McKesson had obtained to fill out its house (Br. p. 35). If this is true, how then could a new distributing house ever be formed? If Seagram

is dissatisfied with Portside, it may move to an existing distributor or abandon the use of distributors altogether and simply integrate vertically. But unless it can find a new distributor who will take on its lines alone (which plaintiff argues is impossible), it cannot participate in the formation of a new house.

Such result was never intended to flow from *Klor's* and *General Motors.*

Over objection (Tr. VIII: 3146), the court gave an instruction that failed to distinguish between an agreement "to terminate" and an agreement to accept McKesson's solicitation, of which termination of Hawaiian Oke was a by-product. Plaintiff offers no reason why the latter should be condemned out of hand under the antitrust laws. Such an agreement, not being anticompetitive on its face and not having as its purpose the infliction of injury on another, must be tested by the rule of reason.

D. The instructions on conscious parallelism

The trial judge told the jury it could infer a conspiracy from conscious parallelism alone. Plaintiff disputes this, saying, "Parallel business behavior, the jury was told, does *not* of itself establish proof of an agreement" (Br. p. 52).

Conveniently, plaintiff omits the key word from the instruction—the word "necessarily." The record is clear that the jury was instructed that while parallel conduct does not "necessarily" establish proof of an agreement, it was evidence from which an agreement could be inferred (Tr. VIII: 3202).

The trial judge himself understood that he was telling the jury it could find a conspiracy from parallel behavior alone:

> Well, I simply say that the fact alone that they acted in a parallel manner may support an inference,

> that is, as I understand the law to be and would hold it to be in this or any other case. (Tr. VIII: 3000.)

It is incredible that plaintiff would now argue that our rejected instructions merely "restate in a different style and with different emphasis" the trial court's instructions on conscious parallelism (Br. pp. 53, 54). The court was asked point blank if it would give an instruction that would incorporate this Court's decision in *Independent Iron Works, Inc. v. United States Steel Corp.*, 322 F.2d 656 (9th Cir. 1963), cert. denied 375 U.S. 922, that conspiracy may not be inferred unless there is

> a sameness of conduct under circumstances which logically suggest joint agreement as distinguished from individual action. (Tr. VIII: 3001-2.)

It refused, not because it felt it was giving the same instruction "with different emphasis," as plaintiff now claims, but because, as the trial judge put it:

> I hold that the Independent Iron Works dicta is wrong. (Tr. VIII: 3005.)

The instructions quoted by plaintiff (Br. pp. 53-54) do not cure the error. They would prohibit a finding of conspiracy where there is unconscious parallel behavior, but they permit an inference of conspiracy from conscious parallelism alone.

Thus the jury was told that conscious parallelism was evidence from which conspiracy might be inferred. To this, the Court should have added that conspiracy was not to be inferred from such behavior unless the circumstances logically suggested joint agreement as distinguished from individual action. That is what our Instruction B-9 said (Error No. 8, App. Op. Br. xvii), and what this Court held in *Independent Iron Works* and the Third Circuit in *Delaware Valley Marine Supply Co. v. American Tobacco Co.*, 297 F.2d 199 (3d Cir. 1961), cert.

denied 369 U.S. 839. That is also what the Supreme Court held in *Theatre Enterprises, Inc. v. Paramount Film Distributing Co., supra,* and *First National Bank of Arizona v. Cities Service Corp., supra.*[13] By refusing to include such a caveat in its instruction, the court permitted the jury to infer a conspiracy from conscious parallel behavior alone. This was reversible error.

IV

ERRORS IN ADMITTING EVIDENCE ON DAMAGES

To divert attention from the issue, plaintiff begins its argument on damages with a dissertation on the sufficiency of the evidence (Br. p. 61 et seq.). This is not before the court. The issue is not sufficiency of the evidence, but the trial court's disregard of the rules of evidence.

A. Admission of exhibits to prove going concern value

1. Mathematical representations of counsel's argument were admitted as evidence

At trial, plaintiff insisted that Exhibits P-2, 3, 4 and 5 were merely representations of counsel's theories and objected that defendants were:

> trying to cross-examine (Caldwell) as though he is vouching for these (exhibits) and that he is an expert. (Tr. 1141.)

Now, in a transparent attempt to re-cast what took place below, plaintiff tries to defend their admission as expert evidence. (Br. pp. 68-73.)

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[13] Plaintiff's attempt to distinguish *Theatre Enterprises* on the ground that it merely affirmed a jury verdict is shown to be fallacious by *Cities Service,* which applied the *Theatre Enterprises* rationale in sustaining summary judgment.

The exhibits were not offered as Caldwell's opinions and conclusions. He was "merely a dummy, Mr. Blecher" (Tr. III: 1141, 1151, 1072-3). In translating counsel's theories into figures, he used some accounting expertise to select certain alternative methods of computation (Tr. III: 1173). But as plaintiff admitted, the expertise was restricted to "very limited areas" and was not "traditional" expert testimony in the sense that Caldwell was "vouching" for the exhibits. (See Op. Br. pp. 48-52: Tr. III: 1072-3, 1141, 1172.)[14]

Caldwell made clear that the exhibits were not offered as his opinion of future profits:

> Mr. Anderson: Do I also understand that in preparation of Plaintiff's Exhibits 2, 3, 4, 5 and 6 you simply followed Mr. Blecher's instructions with respect to the mathematical computations?
>
> Mr. Caldwell: That is correct, sir. (Tr. III: 1151.)

We do not say that counsel may not use a chart or blackboard in argument, nor that charts and graphs representing the opinions of an expert witness are inadmissible. But counsel's arguments may not be converted into evidence by embodying them in charts prepared by an accountant acting as his "dummy."

The fact that Caldwell was a CPA and used some accounting techniques in preparing the charts does not change their essential character as argument of counsel. Unless they represented the accountant's opinions, based on his understanding of accounting principles, the exhibits had no probative value.

Richfield Oil Corp. v. Karseal Corp., 271 F.2d 709 (9th Cir. 1959), cited by plaintiff, does not sanction

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[14]Contrary to plaintiff's assertion (Br. p. 69), Caldwell never testified that he used the most conservative method of projecting future profits. He stated that as to one figure—the percentage increase of sales—the alternative selected by counsel was the most conservative that he had been able to think of (Tr. III: 1173-8).

the presentation of counsel's argument through a "dummy" expert witness. That decision permits *counsel* to outline his computations as part of his *argument,* as in a personal injury case (Id. p. 714). There, using properly admitted evidence, "*counsel* . . . presented to the jury a realistic formula." (Id. p. 715, emphasis supplied.)

If the opinions and conclusions in the charts are counsel's, they must be presented so that the jury clearly understand that they are part of his argument. They may not be mouthed by an "expert" to give them an air of evidentiary validity.

Not only does this artifice mislead the jury, but it deprives defendants of their full right of cross-examination.

We were allowed to examine Caldwell as to why he selected certain methods in presenting counsel's arguments but every attempt to determine whether the projections had any relevance to valuing a business was rebuffed. (Tr. III: 1152-6, 1161, 1169-70, 1177-8, 1189, 1190, 1236-7.)[15]

It is no answer to say that Caldwell was not offered as an expert on valuation. The only issue was value. Expert opinion of estimated future profits is relevant in determining value. If Caldwell was giving his opinion that the projections represented a reasonable estimate of future profits, consonant with sound accounting practices, they had relevance. If he was not "vouching" for

[15]Plaintiff's footnote 11 (Br. p. 71) is a distortion. Our cross-examination included unsuccessful attempts to establish relevancy, to segregate the roles of witness and counsel, questions on the source and use of unaudited figures, and examination on exhibits not here at issue. Cross-examination on March 30 covered 5 pages in which Caldwell answered 12 questions. Cross-examination was constantly interrupted by objection (32 times); 18 were sustained.

them but simply used his expertise to arrive at various alternatives which might or might not be consistent with accepted accounting principles, their probative value was nil.

Plaintiff now claims that this was "relevant data" to value plaintiff's business when every attempt to ascertain their relevance was denied.

Counsel now claims on appeal that an exhibit using price-earnings ratios to arrive at a value represents Caldwell's expert opinion although he successfully prevented cross-examination on the ground that Caldwell had no qualifications to value a business.

Plaintiff attempts (Br. p. 72) to distinguish *Berguido v. Eastern Air Lines, Inc.,* 317 F.2d 628 (3d Cir. 1963), cert. denied 379 U.S. 852, on the ground that Caldwell did not claim expertise in valuing a business. Here, as in *Berguido,* calculations were received and the person responsible for the underlying assumptions was not put on the stand. The court held that the admission of this hearsay was prejudicial error.

Plaintiff argues (Br. p. 70) that the error was cured because the jury was instructed that although it might treat the exhibits as Caldwell's expert opinion, it was free to reject them if it wished. This is no cure. The fact is that the jury was permitted to treat the exhibits as expert evidence although they were simply mathematical representations of counsel's argument.[16]

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[16]The fact that the jury's verdict was lower than suggested by the exhibits is immaterial. Had they been excluded or defendants afforded the opportunity to cross-examine as to the underlying theories and the relevance, the verdict would have been far lower or even nominal.

2. The exhibits were inadmissible as expert opinion

Although Caldwell was offered only as an expert in "computation," plaintiff now seeks to defend the admission of these exhibits as Caldwell's expert accounting opinions. Apart from commingling of argument and evidence, the exhibits did not meet the requirements of expert opinion.

a. No foundation was laid to qualify Caldwell as an expert in profit projections

Plaintiff says that Caldwell was offered as "an expert in accounting and computation" (Br. 71). At the trial he was offered as an expert in computation, not as an expert in profit projection (Tr. III: 1072-3; 1141, 1151-4). Counsel stipulated "that anybody with a good education could make a mathematical computation." (Tr. III: 1151).

Had Caldwell been offered as an expert on profit projections, defendants would have had the opportunity to question him on his qualifications. Evidence cannot be introduced on one theory and then on appeal defend its admission on another. *Standard Oil Co., of California v. Moore, supra* at 217-18.

b. The exhibits were irrelevant to the issue of market value

No witness testified that the exhibits were relevant to market value. If not relevant, they were not admissible. *Standard Oil Co. of California v. Moore, supra* at 219-20. Not only did plaintiff fail to establish relevance, but defendants were precluded from exposing the defect.

As pointed out in our opening brief (p. 54), the projections were based on figures including income from property not owned by the plaintiff—the leasehold that

had been transferred to Thelma Wong. The fact that the expenses of the leasehold were included does not cure the defect. Plaintiff's records did not segregate the leasehold expenses from others. The admission of irrelevant data was error.

c. **The exhibits are based on assumptions not supported by evidence**

Plaintiff lamely defends the assumptions underlying the projections by pointing to McKesson's experience and asserting that the jury might have found that plaintiff's 1965 second-half gross sales would have exceeded its first-half sales notwithstanding the "June balloon" (Br. p. 74). This is immaterial.

The question is: What in this record supports the assumption that plaintiff's 1964 pattern would have applied to the unique conditions in 1965?

This assumption produces an increase in sales of $230,000 with a decrease in expenses of $80,000 (Op. Br. pp. 55-57). No evidence was offered to explain the absurd result.

Plaintiff argues that our objections based on the unfounded assumptions go only to the weight. This is not so. Mathematical computations based on unfounded assumptions or on assumptions in conflict with the evidence are inadmissible. (See Op. Br. pp. 60-62.)

Connecticut Importing Co. v. Frankfort Distilleries, 101 F.2d 79 (2d Cir. 1939), cited by plaintiff, holds that errors in computations may be brought out on cross-examination. It does not hold that projections based on unfounded assumptions are admissible. This was made clear in *Herman Schwabe, Inc. v. United States Shoe Machinery Corp.*, 297 F.2d 906 (2d Cir. 1962), cert. denied 369 U.S. 865 (1962) and *Syracuse Broadcasting Co. v. Newhouse*, 319 F.2d 683 (2d Cir. 1963).

Sunkist Growers, Inc. v. Winckler & Smith Citrus Prod. Co., 284 F.2d 1, 30 (9th Cir. 1960), mod. 289 F.2d 933, rev'd on other grounds, 370 U.S. 19 and *Lessig v. Tidewater Oil Co.*, 327 F.2d 459, 473 (9th Cir. 1964), cert. denied 377 U.S. 993 (which plaintiff ignores) make clear that the law in this circuit is in accord.

3. Use of McKesson as a "yardstick"

Exhibit P-4 is based on the assumption that had plaintiff remained in business, it would have had the same ratio of net income to sales that McKesson had in the years 1962-1964. No evidence was introduced to support this assumption. Both firms operated in a free market. McKesson's ratio averaged 3.05% while plaintiff's was 0.40%. (Exs. P-1, P-4; Op. Br. p. 66.)

Plaintiff defends the assumption because:

1) Abe Kauhane and Ted Wong had similar backgrounds;

2) Hawaiian Oke's *gross sales* were better than Portside's as to certain products acquired by Portside in the 1965 change of distributors;

3) Seagram had not been satisfied with McKesson's pre-1965 performance as to the Four Roses Kessler line and the Frankfort McKenna line; and

4) Both firms operated in the same area. (Br. 77.)

These facts do not establish the comparability of the net income to sales ratio, the question in issue.

The question is *not* whether Hawaiian Oke would have sold as many cases of liquor as Portside (or more), but whether its net income would have been 3.05% of such sales. Had plaintiff been able to lay a foundation by

showing some comparability to McKesson's ratio in 1962-1964, it might have been reasonable to apply that ratio to its projected 1965-1969 sales.

Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251 (1946) holds that where a plaintiff's earnings were abnormally low due to the conspiracy, earnings of a similar establishment that has not been affected by the violation may be used as a yardstick. No case sanctions the yardstick test where the two businesses *were* in operation during the same period, free from an antitrust violation, where it is uncontradicted that they were not comparable in the aspect sought to be compared.

Ted Wong may have had a good background, but Hawaiian Oke's ratio of net profit to sales never exceeded 0.70% from 1962-1964. McKesson may not have done particularly well with the Kessler and McKenna lines, but it maintained 3.05% ratio of its net income to sales. Portside may not have sold as many cases of liquor in 1966 as Hawaiian Oke did previously; the comparison, however, was not with Portside's 1966 sales, but McKesson's net income to sales ratio for 1962-1964.

As this Court stated in *Flintkote Co. v. Lysfjord,* 246 F.2d 368 (9th Cir. 1957), cert. denied 355 U.S. 835 (1957):

> Where no basis for comparison was shown such evidence has been rejected. (246 F.2d at 393)

Plaintiff would have this Court believe that in *Wm. Goldman Theatres v. Loew's, Inc.,* 69 F.Supp. 103 (E.D. Pa. 1946), aff'd 164 F.2d 1021 (3d Cir. 1948), cert. denied 334 U.S. 811 (1948), the comparison was allowed despite major differences in "extremely important" factors (Br. 78-79). Contrary to plaintiff, the court found the differences insignificant and would not "have any noticeable effect on the (plaintiff's) business" (69 F. Supp. at 107-8).

Furthermore, in the *Goldman* case, the comparative figures were not available. The plaintiff had been prevented from operating his theatre because of the conspiracy. The court stated:

> . . . (W)here the tort itself has created a partial blackout, the standard which plaintiff's evidence must meet will be somewhat lowered. (69 F.Supp. at 106.)

Here, the figures are known. Nothing in the evidence justifies the assumption that plaintiff's ratio of net income to sales would suddenly have jumped by over 750%.

B. Evidence of expressions of interest in purchasing plaintiff's business was erroneously admitted

The only question before the jury on damages was whether plaintiff's business had a value above the $149,000 received on liquidation. Any evidence not probative of this question was irrelevant.

Ted Wong's testimony that five persons expressed interest in purchasing Hawaiian Oke does not have the slightest tendency to prove that the business was worth more than $149,000. Not one ever made an offer. As in *Dantzler v. Dictagraph Products, Inc.*, 309 F.2d 326 (4th Cir. 1962), cert. denied 372 U.S. 976, none of them was called as a witness by plaintiff. The jury was left to speculate what they would have offered, if anything.

Lindus (referred to by Wong) was called by defendants. He, like the others, lost interest as soon as he saw the financial statement (Tr. V: 1812-13).[17]

The admission of the irrelevant testimony was prejudicial error. See, *Dantzler v. Dictagraph Products, Inc., supra* at 329-30.

[17]Gonzales mentioned a figure of $360,000 for a possible purchase of *both* Hawaiian Oke and Von Hamm-Young, without allocating the price between the two.

C. The court erred in admitting evidence of plaintiff's out-of-pocket losses

Plaintiff's argument on the admissibility of out-of-pocket loses over the years 1959 through 1966 rests entirely on Exhibits P-2, 3 and 4—the profit projections. They show that if plaintiff had remained in business with Seagram and Barton lines, it would have made a profit in 1965 and 1966. Exhibit P-6 simply shows net losses for these years.

If Exhibits P-2, 3 and 4 were admissible to show profits, the jury might conclude that the losses resulted from the change of distributors but those exhibits were inadmissible.

The cases cited by plaintiff to support the proposition that the jury must be permitted to draw the inference of causation have not been applied where plaintiff makes no effort whatsoever to show why a particular loss was attributable to the defendant's conduct. Here, plaintiff alleged a conspiracy and simply showed that in 1965 and 1966 it lost money. Something more than this is required. *Talon, Inc. v. Union Slide Fastener, Inc.*, 266 F.2d 731 (9th Cir. 1959).

V

ERRORS IN INSTRUCTIONS ON DAMAGES

A. Instruction permitting consideration of future profits

From plaintiff's description of the court's instruction (Br. 84), one might think that the court "specifically" told the jury that future profits were to be considered only as they bore on the question of market value. A reading of the instruction (Op. Br., App. p. xxv) shows that this was not made clear. After the jury was charged that they could consider all the facts and circumstances on the question of lost value, it was then told that they could consider "the question of future profits."

The refusal to give Instruction M-C, which would have removed the ambiguity, was error.

B. Instruction on interest of third parties in purchasing Hawaiian Oke

Plaintiff states, "There were clear indications that in purchasing such a business, a price in excess of liquidation could be commanded" (Br. 85). The transcript references (Tr. 385-6 and 1645-6) do not support the statement.

One passage relates to the purchase by McKesson of another distributor and to the fact that in purchasing a distributor, the buyer and seller must work out an agreement on the price. The other is the Gonzales testimony discussed above.

The cases cited by plaintiff have nothing to do with the error in the court's instruction.

C. Instruction relating to Caldwell

As was admitted below, Caldwell was presented as a "dummy" witness to mouth the theories of counsel. Not only were the exhibits admitted as expert evidence, but the jury was told that they might treat them as such:

> The testimony of an accountant . . . and any charts or graphs prepared by him and admitted in evidence were received for the purpose of explanation of the facts disclosed by the books and records and other documents which are in evidence. . . . (Tr. VIII: 3193-94.)

The jury was also told that Caldwell was "an expert in accounting" and that it could give each expert opinion whatever weight it thought it deserved. (Tr. VII: 3193.)

The Caldwell exhibits, however, were *not* an accountant's explanation of the facts, and Caldwell was not pur-

porting to give expert opinion testimony, except in a "very limited" sense. (Tr. III: 1072-3, 1141, 1151, 1172-3.)

While the jury was told that the charts were not "in and of themselves" evidence and were to be disregarded if they did not correctly reflect the figures in evidence or were not "summaries of facts and figures shown by the evidence" (Tr. VIII: 3194), this does not cure the error. Unlike Caldwell's graphs (Exhibits P-106-114), the projections were *not* summaries of figures in evidence. They were an accountant's rendering of counsel's inferences drawn from the facts. There was no question as to whether the charts accurately reflected figures in plaintiff's books. The question was whether this was expert opinion testimony at all.

The vice of these instructions is that they permit the jury to give the projections weight as expert opinion testimony if they find that the underlying figures are correct reflections of what appears in plaintiff's books.

The error was compounded by the court's refusal to give proposed Instruction B-25, which would have made clear to the jury that Caldwell simply prepared the projections in accordance with the instructions of plaintiff's counsel.

D. Refusal to give instructions relating to Hawaiian Oke's rental income

Plaintiff states that the fact that the leasehold was not owned by the corporation was "unimportant to the crucial question of the 'going concern' value . . ." (Br. p. 88). As this Court made clear in *Standard Oil Co. of California v. Moore, supra,* the transferability of value *is* crucial in determining whether a firm has going concern value and, if so, how much. If an aspect of the business is not transferable, it is not to be considered in determining going concern value.

Plaintiff could have called its accountant to estimate the expenses attributable to the rental income. The fact that its statements showed only the irrelevant income and did not segregate the irrelevant expenses cannot be blamed on defendants and cannot make the jury's consideration of the income permissible. The argument that this went to the weight of the evidence is without merit.

CONCLUSION

For the reasons set forth herein and in our opening brief, the judgment should be reversed with direction to enter judgment dismissing the complaint.

Dated, Honolulu, Hawaii,
August 9, 1968.

Respectfully submitted,
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Certificate of Counsel

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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Attorney for Appellants.

No. 22163

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

John Boyce, an individual, and
FMC Corporation, a corporation,

Appellants and Cross-Appellees,

vs.

Earl R. Anderson, an individual, and
Filper Corporation, a corporation,

Appellees and Cross-Appellants.

OPENING BRIEF OF APPELLANTS AND CROSS-APPELLEES

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Statutes

Constitutions

Rules

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Appellees and Cross-Appellants.

OPENING BRIEF OF APPELLANTS AND CROSS-APPELLEES

This action is brought under the provisions of Section 146 of the Patent Act of 1952, Public Law 593, 82nd Congress, 2nd Session, Chapter 950, 66 Stat. 792, 35 U.S.C., Section 146, by plaintiffs as a party dissatisfied with the decision of the Board of Patent Interferences on the question of priority. The Complaint herein was filed April 30, 1962, and proceeded to trial on the basis of the First Amended Complaint herein filed June 11, 1962, Answer of defendants herein filed on or about August 30, 1962, and the Order of March 28, 1966, Transcript of

Record Volume I, pages 108-109 directing that all proofs of both parties on the issue of public use and/or on sale as contemplated in 35 U.S.C. Section 102(b) shall be submitted for the Court's consideration before the submission of proof on any other issues herein, and upon the issues of fact and law defined in the Pretrial Order filed May 26, 1966, Tr. Volume I, pages 119-134.

This appeal is taken from the Judgment of July 7, 1967, Tr. Vol. I, pages 146-147, as purportedly supported by the Findings of Fact and Conclusions of law filed July 7, 1967, Tr. Vol. I, pages 139-145; Appellants and Cross-Appellees Notice of Appeal filed July 26, 1967; and Appellees and Cross-Appellants Notice of Cross Appeal filed on or about August 4, 1967.

Appellants and Cross-Appellees in this appeal urge this Court to reverse the Judgment of the District Court which in effect holds that plaintiffs herein are not entitled to any patent because of prior public use of the invention at a time more than a year prior to the filing date of the application for a patent and also seeks reversal of the Judgment entered by the District Court, based upon the failure of the District Court to determine the issue of priority of invention, the relief sought by plaintiffs in the filing of this action being under the said Section 146, U.S.C. 35.

As a result of said interference a patent was granted to Earl R. Anderson and Filper Corporation, Appellees and Cross-Appellants, Patent No. 3,075,566 (Designation of Record On Appeal, Tr. Vol. I, Page 158, in which the claimed subject matter of the interference and holdings of the Board of Interference Examiners' decision from which this action was instituted was granted.

Hereinafter the parties hereto will be referred to as plaintiffs and defendants, i.e., their positions before the District Court.

JURISDICTION

Jurisdiction is based upon Title 28, U.S.C. Sections 1338 and 1291 as this is an action brought under the provisions of Section 148 of U.S.C. Title 35 in that the judgment entered by the District Court is final in nature in dismissing the Complaint herein, even though based upon an order for a separate trial upon the single issue therein stated of prior public use.

CONCISE STATEMENT OF THE CASE

This action was first commenced in the Patent Office by the Declaration of Interference No. 89173 between application of Boyce Serial No. 664,711, filed June 10, 1957 and the application of Earl R. Anderson, filed August 6, 1956, Plaintiffs' Exhibit 1, Defendants' Exhibit AR, R. 7, Page 689*. That interference before the Patent Office included as the issue of the interference the count or claims:

> "Count 1
>
> The method of removing a pit from its cavity in a peach half which comprises; supporting said peach half, applying an arcuate force to one edge of said pit adjacent one edge of said pit cavity, and guiding said pit adjacent an opposite edge of said pit cavity along an arc which is a continuation of the curvature of said cavity."

The decision of the Interference Examiners, Plaintiffs' Exhibit 88, page 1 thereof, R. Vol. 7, 689. The decision of the Board of Patent Interferences is based upon a holding that Boyce (Plaintiff) has not proven that he

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* The transcript of evidence before the District Court will herein be referred to as Record or R. followed by the volume and page number where applicable.

conceived the invention of the count or reduced it to practice prior to August 8, 1956, the date of filing of the Anderson application (Exhibit 88, page 17). It was from this decision of the Board of Patent Office Interference Examiners that this action was instituted under the provisions of said Section 146 of U.S.C. Title 35. Based upon this decision the Patent Office granted to Anderson the patent No. 3,075,566. For the convenience of this Court a reproduced copy of the said patent is appended hereto and the said interference count or claim is included in the said Anderson patent as claim 7 thereof. The Judgment of the District Court from which this appeal is taken is purportedly supported by the Findings of Fact Nos. 11, 12, 13, 14, 15, 16, etc. which, in effect find plaintiffs herein in possession of the invention of the said count or claim from February of 1955 through the peach pitting season of 1956 and had, through that period of time, in bringing the invention to commercial perfection, spent a total of $808,907.66 (Finding 39), Tr. Vol. I, page 145.

In the history of the development of this peach pitter the process of pitting peaches, the subject matter hereof, begins with the conception of the invention by John Boyce as shown by two disclosure sheets dated respectively January 31, 1955 and February 1, 1955, Exhibits 2 and 3, R. Vol. 3, page 299. Immediately following these disclosures of this invention there was performed what is referred to in the record as the screwdriver test, which screwdriver test was in its entirety reproduced before the District Court by plaintiff John Boyce and Paul Curtis Wilbur, R. Vol. 2, pages 216 to 219. This same demonstration had previously been made to defendants herein and as a record of the said demonstrations there was produced and received in evidence Exhibit 96, R. Vol. 4, Page 355.

The screwdriver tests demonstrated the fact that the pit of the peach could be removed in accordance with the method as defined by the count of the subsequent interference. These screwdriver tests demonstrated, however, as is clearly evident from the record before the Court, the problems existent in commercial use of this process and these problems were (a) the problem of yield, and (b) the problem of pit fragments in the peach halves. The yield generally referred to in this brief is the number of cases of peaches which are obtained from a ton of peaches as delivered to the cannery and is the dominant factor in the total cost of production, R. Vol. 3, page 296. Pit fragments must be entirely absent in order to produce an acceptable product, R. Vol. 3, pages 296-297. As shown by the photographs of Exhibit 96 of the screwdriver tests the presence of pit fragments resulting is evident as is also the problem of yield due to the adherence of peach flesh to the pit as removed.

The screwdriver tests, as is true of subsequent development of the method involved also established that the appearance of the peach half produced particularly in the pit cavity was not similar to that produced in other peach pitting methods, R. Vol. 4, page 371.

It having been developed through the screwdriver tests that the method of removing pits was operative and feasible there remained the problem of overcoming the pit fragments and to so improve the method of operation as to make it commercially feasible from the standpoint of yield. The solution to these problems was immediately undertaken by plaintiff FMC and the fact of this continued experimentation was conceded by defendants' counsel up until August 8, 1955, R. Vol. 3, page 302 and R. Vol. 4, pages 351 and 357. The record

shows that during this period of time a prototype was constructed of what thereafter became known as the 300 head, which head was produced in evidence as plaintiffs' Exhibit 15, R. Vol. 3, page 367. The first of these heads, Exhibit 15, was demonstrated to certain canners in a closed padlocked room located in the California Packing Corporation Plant #3 in August and September of 1955 under confidential arrangements, R. Vol. 4, pages 359-360. The primary purpose of this confidential demonstration of this machine was to determine the acceptance of the peach halves so pitted because of the appearance of the pit cavity, R. Vol. 4, page 371. The second purpose was to determine as to whether or not there would be an extensive or limited use of the method, R. Vol. 4, page 371. The third reason was to determine whether or not the considerable additional expenditure would be justified in endeavoring to overcome the problems that still existed of pit fragments and yield, R. Vol. 4, pages 371-372.

As of December 7, 1955 the expenditures on this development had reached nearly $114,000.00, R. Vol. 4, pages 372 and 375. It was explained to the canners to whom the demonstration was made that if justified, FMC intended to build further prototypes to be sent to Australia to intercept the peach season in the early part of 1956 to carry on further perfection and development of the method and machinery necessary for carrying out the method in the hopes that perfected machines might be developed for use by the canners in the 1956 season.

Such a program envisioned large expenditures and it was necessary for FMC to conduct what the Court referred to as a market survey to determine whether or not such additional expenditures were justified. It

was explained to the canners at these demonstrations which were carried on in September of 1955 that the operation was experimental, not perfected, that the operations were carried on under conditions of confidential disclosure and that FMC contemplated further development of the method and apparatus for carrying out the method in the peach pitting season in Australia in 1956. See Hauptman, Tri-Valley Packing Association, R. Vol. 4, pages 338 to 340, Annotti, Fairview Packing Company, R. Vol. 4, pages 410 to 414, Pogetto, Fruitvale Canning Company, R. Vol. 3, pages 225-227, House, President, Frank M. Wilson Company, R. Vol. 3, pages 249 to 253. Morici, Production Manager of Herschel & Co. (Now Carnation Company), R. Vol. 3, pages 271-274, Rea, President, U.S.P. Corporation, Vol. 6, pages 560-564, Saxby, Manager, California Division of California Packing Corporation, R. Vol. 6, pages 574-581, Richards, Sr., Vice-President and Manager, Bercut Richards Packing Company, Deposition Exhibit 98, pages 44-46 thereof and pages 40-41, Wilbur, R. Vol. 7, pages 678, 679, Vol. 4, pages 357-367, 371-375.

The two prototype heads, Exhibits 15 and 16, after these experimental demonstrations were never used again and were abandoned because of their obvious shortcomings as determined by their attempted experimental use. R. Vol. 5, page 451.

FMC, after receiving a favorable response that such new method of pitting would be used if successfully developed in Australia, went forward with the project and constructed eleven heads, one exemplar of which, after it was modified in Australia, is in evidence as Exhibit 86, R. Vol. 5, pages 451-452. The eleven heads built are illustrated in the photographs, plaintiffs' Exhibits 43 and 44. The eleven heads sent to Australia were built subsequent to the California Packing Corporation Plant

#3 demonstrations and were sent to Australia in the beginning of 1956 and when received in Australia were found to be deficient and not capable of use. Wilbur, R. Vol. 5, pages 461, 462; Wilbur, R. Vol. 4, pages 421-423. Complete records of the Australian testing and experimentation, Exhibits 51 to 56, record the daily progress, Wilbur, R. Vol. 4, pages 423-431. In fact it was stipulated ". . . in Australia considerable number of changes in those pitting heads, in the machinery involved", R. Vol. 4, page 432. The Court accepted these facts, R. Vol. 4, pages 432, 433 and 434. Wilbur testified to and demonstrated from the exhibits prepared, R. Vol. 5, pages 455-486.

Mr. Wilbur testified to the development, changes made, time periods of such changes, the testing of the different machines produced, and for this purpose produced a chronological report of the work done in this regard, which is in evidence as Exhibit 94, R. Vol. 5, page 491. With reference to this Exhibit 94 and the testimony of Mr. Wilbur, the changes which were made *in the method and apparatus* for carrying out the pitting is graphically illustrated beginning with the screwdriver tests conducted in early February of 1955 and extending through the period of time ending at the end of the 1956 peach pitting season with the development of the final form of apparatus for carrying out the method including the final modifications of the method itself, the showing that the final form of peach developed, i.e., Exhibit 87, R. Vol. 5, pages 465-467, was placed in commercial use in the F.M. Wilson Plant in Stockton in 1957, and was a commercially successful operation, see House, Vol. 3, pages 257, 250. In this respect Mr. Wilbur, throughout his examination of the development of this method, analyzes each and every modification and each step of the method carried on by FMC. R. Vol. 5, pages 455 to 491. It is shown in this re-

gard that the ultimate cost to FMC of this development and experimentation to December 11, 1956, was in the sum of $808,907.66. R. Vol. 5, pages 447-448.

Faced with an expenditure of this magnitude in eliminating the problems of pit fragments and yield as were apparent from the beginning of the screwdriver tests in 1955 and as we will hereafter show were still existent in the machines placed in experimental use in the 1956 peach pitting season. FMC conducted what was very reasonably termed by the Court, R. Vol. 5, pages 374, 375, as market research to determine whether or not they were justified in going ahead with this project with the contemplated sending of the machine, crew, engineers, and experts to Australia, with a view toward developing a pitting machine which might be used in the 1956 pitting season.

The 1956 pitting season starts clearly within the statutory period of one year prior to the filing of the Boyce application so that what was done in the 1956 pitting season cannot be viewed as a statutory bar within the provisions of Section 102(b), 35 U.S.C. However, evidence as to what was done throughout the 1956 pitting season is set forth completely in this record to show that through that season and until the end thereof when the final solution was finally arrived at in the F.M. Wilson plant in Stockton with the development of the Exhibit 87 head, the problems of yield, pit fragmentation and operation of the pitting head to a commercial point did not exist.

FMC, after the test demonstrations in the California Packing Corporation Plant #3 in San Jose in August and September of 1955, inquired of those of its customers who were previously using the FMC rotary knife pitter as to what quantity of machines they would use in the 1956 pitting season of the type under consideration in

the event that on final experimentation and development in Australia a commercially usable apparatus for carrying out that method was developed. In so doing, in accordance with their custom, they presented leases to the canners with the understanding that the canners would use either the rotary knife pitter or the pitter with the newly developed head if the development in Australia was successful. Wilbur, Vol. 4, page 375. The development, however, did not end until late in the 1956 canning season with the final development of the Exhibit 87 head at the F. M. Wilson Plant in Stockton. The canners were supplied with both knife pitters which do not involve the invention of the count of this interference and heads which were the final development of the Australian experimentation in the 1956 pitting season and these heads were interchangeably used in that season in an effort to bring to final culmination the production of a successful head embodying the method of the count of this interference.

REA, U.S.P. Corporation, R. Vol. 6, pages 559 to 561;

SAXBY, California Packing Corporation, R. Vol. 6, pages 557 to 580;

HOUSE, Frank M. Wilson Company, R. Vol. 3, page 256;

POGETTO, Fruitvale Canning Company, R. Vol. 3, pages 237-238;

MORICI, Herschel & Company, R. Vol. 3, page 273;

HAUPTMAN, Tri-Valley Packing Association, R. Vol. 4, page 335 (in 1955-56 used only the knife pitter); R. Vol. 4, pages 335, 336 (except for placing of a single machine in the Tri-Valley Packing Association Plant for experimental purposes and which was operated by FMC personnel).

SIGLER, Libby, McNeill & Libby, R. Vol. 4, page 397 (used only the knife pitter in 1956); R. Vol. 4, pages 397-398 and 303-304 (except for one 300 type head machine which was used experimentally).

ANNOTTI Fairview Packing Company, R. Vol. 4, page 407 (used only knife pitters).

RICHARDS, Bercut-Richards Packing Company, Deposition Exhibit 98, pages 29 and 41.

It is factual that no canner paid for any use of the pitting heads involving the process or operation of the count of this interference in the 1956 canning season.

REA, U.S.P. Corporation, R. Vol. 6, page 567.

SAXBY, California Packing Corporation, R. Vol. 6, page 574 (used only the knife pitter);

HOUSE, Frank M. Wilson Company, R. Vol. 3, pages 254 and 263;

POGETTO, Fruitvale Canning Company, R. Vol. 3, pages 241-242;

MORICI, Herschel & Company, R. Vol. 3, pages 290-292;

SIGLER, Libby, McNeill & Libby, R. Vol. 4, pages 335-336 (except for one experimental machine used FMC knife rotary pitters); R. Vol. 4, pages 403-404 (didn't use the torque or rotary pitter);

ANNOTTI, Fairview Packing Company, R. Vol. 4, page 407 (used only a knife pitter);

RICHARDS, Bercut-Richards Packing Company, Deposition Exhibit 98, pages 41, 43, 46, 47 (used and only paid for knife pitters).

In fact the record shows clearly that all canners were in a position of trying out the new heads, changing the

heads back to the knife pitters and that FMC in this development kept a crew of engineers, operatives and in fact executive personnel in the canneries at all times during the 1956 pitting season in an effort to bring this development to a successful culmination. It is shown by the record that the heads embodying the use of the method of the count of this interference were under constant revision in each of the canner's plants throughout this 1956 season. The heads were breaking down due to further pit jamming and pit fragmentation, they were under constant change, development, reconstruction and replacement, and for this purpose a constant crew was kept in each plant.

The District Court recognized the proofs offered in this regard, R. Vol. 6, pages 627, 628. Each of the canners testified as to their understanding of the interchangeability of the heads from the knife pitter to the torque type head, i.e., the 300 head, and testified that they understood that they would have pitting machines for the 1956 season and could and would use the old knife pitters in the event of the failure of the Australian venture to bring the new torque pitter to a point of commercial operation. In this regard each of the canners testified with respect to the 1956 operations, i.e., the testing thereof, in their canneries, the failure of the machines to be commercially operable, and the crew of mechanics, engineers and personnel present during the testing. During this period of time FMC had ten different heads, i.e., ten different kinds of heads which were color coded under experimentation. Wilbur, R. Vol. 5, pages 538 to 544. Each of the canners testified that such operations were experimental and were so looked at by them. Each of the canners testified that they made no payment for their operations in the 1956 season where the new form of head was attempted to be used,

even to the extent of not paying for any use of the knife pitters where the extensive experimentation was undertaken to bring the torque 300 heads to successful development and in fact the testimony was that they had no records which enabled them to determine at any time as to whether they were using knife pitters or the 300 torque pitters in pitting the peaches.

Two of the canners, i.e., FMC's principal and largest customers, Libby, McNeill & Libby and California Packing Corporation, upon being advised by Mr. Wilbur of the extent of the development, used in their commercial operations only knife pitters with the exception of Libby's experimentation with one head. Each of the canners who signed a lease with FMC for pitters for use in the 1956 season understood the interchangeability of the knife head and that they would be supplied with knife pitting heads to use in their commercial operation in the event of failure of the Australian project to bring the new torque 300 head to a point of commercial applicability. Not only did FMC bear the entire expense of this undertaking, but they lost all revenue even for the use of the knife pitters in the canneries where this experimentation was conducted in the 1956 season. This loss of revenue is not included within the over $808,000.00 cost of this development heretofore referred to. Wilbur, R. Vol. 5, pages 499-502. FMC is recognized as a very large corporation and it is frankly stated, on inquiry by the Court, that this undertaking was the largest gamble ever undertaken by FMC in an effort to develop this method to a point of successful culmination. Wilbur, R. Vol. 5, pages 494-495.

The policy of FMC with respect to filing of patent applications is not to rush to the Patent Office with the filing of applications on untried and unproven develop-

ments but has been at all times, as shown by this record, to wait with the filing of an application so that the applications when they are filed will set forth a proven successful development of the mental concept to a point of commercial success and applicability. FMC's policy in this regard is not to file patent applications to have patents issued to them until the invention is perfect and properly tested and until they can set forth in that application fully and completely the best known mode which they have been able to determine of carrying out the invention. Wilbur, R. Vol. 3, page 326.

Research and development in this field has been conducted cooperatively for many years. In carrying out this cooperative research machines, processes or devices when brought to a stage of possible demonstration have been placed in canneries under precisely the same conditions as hereinabove outlined in perhaps all stages of such development and for the same purposes as hereabove demonstrated. It is recognized also that dependent upon the type of development under consideration and the product dealt with in order to bring the development to a point of successful consummation multiple installations are required. It has long been recognized that control tests under the auspices of experts and engineers do not give a reliable result. Wilbur, R. Vol. 3, page 318. Although the procedure followed in this case was unusual because of existing practices in the art the magnitude of the venture undertaken and the very complexities which became apparent in overcoming the problems of pit fragments and yield made this procedure necessary to bring to perfection the method and the apparatus for carrying out the method before that method could be competitive with existing methods of removing pits from peaches. R. Vol. 5, pages 494-497.

In the peach pitting field many varieties of peaches are processed in several different territorial regions and under varying conditions and even tests conducted by engineers and under precise conditions of control on one or more of such varieties experience has shown cannot be relied upon. R. Vol. 3, pages 317 to 325.

There can be no serious dispute with respect to the foregoing statement of facts of this case and specific findings with reference thereto were adopted by the Court as findings 11 to 22, inclusive, and findings 27 to 37 inclusive, and that experimentation and testing by FMC continued to the end of the 1956 pitting season resulting in a total expenditure of $808,907.66 is also set forth in Finding 39.

It is fundamental and is in fact admitted that until a practical way of using the method was developed, the method was of no use, that a method and the mechanism to carry out the method are in fact inseparable. R. Vol. 4, page 438.

In the trial of this cause the Court permitted counsel for defendants to introduce evidence through the reading of depositions where there was no compliance whatsoever with the Federal Rules of Civil Procedure with respect to the signing, presentation of the deposition to the witness for correction, waiver or corrections, or waiver of signature, where the depositions were not signed before a notary, where it was shown that the witness had requested the opportunity to read and correct his deposition before signing, and where there was no notice of filing or reliance upon the deposition filed with the Court. In this cause there was no notice given by defendants of the filing of the depositions taken as required by Rule 30(f)(3). There was no submission of the depositions to the witnesses for changes before signing as required by

Rule 30(e). In fact the witnesses were never given an opportunity to even read their depositions. There was no waiver of signatures. There was no refusal to sign. In fact there was no opportunity given the witnesses to sign their depositions. The total disregard of the rules with respect to the depositions was duly objected to by counsel for plaintiffs. The particular deposition which was read from over the objection of plaintiffs' counsel was the deposition of Clifford Carlton Wilson. There was no stipulation with respect to the taking of this deposition or as to the waiver of reading or signing the deposition. The record with respect to this matter is contained in R. Vol. 1, page 96, to R. Vol. 2, page 115. The ruling of the Court after the objection was stated is contained at R. Vol. 2, page 115.

The same objection was made and overruled with respect to the reading from the deposition of Mr. Wilbur and where it was specifically shown with respect to that deposition that the witness requested the opportunity to read his deposition to correct it, and to sign it personally. The ruling of the Court with respect to the Wilbur deposition is found at R. Vol. 2, page 130.

SPECIFICATION OF ERRORS

1. The District Court erred in finding that the large number of Model 300 machines and the number of leases involved in FMC's leasing program for the 1956 peach pitting season, as well as the circumstances under which such machines were placed for use, requires a finding that the plaintiffs did intend to and did commercially use such machines.

2. The District Court erred in concluding that plaintiffs placed the invention in issue in public use and on sale more than one year prior to the filing of their application

for Letters Patent Serial No. 664,711 within the meaning of 35 U.S.C. § 102(b).

3. The District Court erred in finding and concluding that plaintiffs herein are barred from receiving a patent for the invention set forth in application Serial No. 664,711.

4. The District Court erred in limiting the issues to the issue of public use and/or on sale to be heard at the trial of this cause within the provisions of 35 U.S.C. § 146.

5. The District Court erred in failing to find that all activities engaged in by plaintiffs prior to June 10, 1956, were experimental in character and did not constitute a public use or the placing upon sale of the invention in issue prior to said date of June 10, 1956.

6. The District Court erred in failing to find that plaintiffs herein continued beyond June 10, 1956, in experimentation of and to bring the method defined by the single count of the interference to perfection where the same was susceptible to satisfactory cannery operation and that the plaintiffs' activities in this regard continued through experimentation into the 1956 canning season.

7. The District Court erred if in fact it did base its Conclusions of Law and Judgment herein upon the installation of Model 300 machines in FMC's customer's cannery plants during the 1956 cling peach season, thus constituting public use and/or placing on sale of the invention in issue within the meaning of 35 U.S.C. § 102(b).

8. The District Court erred if in fact it did rely upon the placing of Model 300 machines in use during the 1956 clingstone peach season and that several of the

customers reported the tonnage of peaches processed on such machines and were presented in due course with lease rentals and that some paid rentals due FMC under their leases as constituting plaintiffs placing the invention in public use or on sale for more than one year prior to the filing date of application Serial No. 664,711 within the meaning of 35 U.S.C. § 102(b).

9. The District Court erred in failing to find that the extended activities of FMC in carrying out its experimentation and testing of the pitting devices to the end of the 1956 peach pitting season, amounting to $808,907.66, established the continued experimentation and testing of pitting devices to bring the method in issue to perfection within the statutory one-year period within which the application Serial No. 664,711 was filed in the United States Patent Office within the meaning of 35 U.S.C. § 102(b).

10. The District Court erred in admitting into evidence depositions of or portions of the depositions of witnesses where it was shown that there was no compliance with or waiver of provisions of Rules 30(e) and 31(c) of the Federal Rules of Civil Procedure and that the witnesses have not signed the depositions or that signature thereof was waived. The said depositions were the depositions of Clifford K. Wilson, Paul C. Wilbur, and John Boyce.

ARGUMENT AND LAW APPLICABLE

It is the position of Appellants that the District Court has erred in this case primarily with respect to what constitutes prior public use under the provisions of Section 102(b) of 35 U.S.C. This section provides:

> "A person shall be entitled to a patent unless —
>
> . . . .

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of the application for patent in the United States, . . ."

It is secondly the position of appellants in this matter that the District Court erred in its order limiting its determination on the trial of the issues of this matter to the question of proof related to the element of prior public use and in this respect has confounded the issues here and as hereinafter will be pointed out has left standing a patent, presumably valid, the effect of which is to suppress invention and development in this important field and where admittedly that patent is being used by Appellee Filper Corporation for that sole purpose of suppressing competition and development in this field, Filper's position in this respect being amply described by the District Court as a dog in the manger. R. Vol. 5, page 506.

It is the third position of the appellants herein that with respect to the issue of prior public use from the variant admissions made by the parties before the Court and the fact of continued experimentation and development, the District Court erred in the application of law with respect to what constitutes prior public use. The leading case upon this issue is *Elizabeth v. Pavement Co.,* 97 U.S. 126 to 144 (October 1887). This case establishes the rules with respect to what constitutes prior public use as differentiated from experiment as follows:

". . . The use of an invention by the inventor himself, or of any other person under his direction, by way of experiment, and in order to bring the invention to perfection, has never been regarded as such a use. . . ." 97 U.S. 134.

and establishes further the rule that there is within the policy of the law not a race to the Patent Office. Thus, the Supreme Court in the *Elizabeth v. Pavement Co.* case states:

> "It is sometimes said that an inventor acquires an undue advantage over the public by delaying to take out a patent, inasmuch as he thereby preserves the monopoly to himself for a longer period than is allowed by the policy of the law; but this cannot be said with justice when the delay is occasioned by a *bona fide* effort to bring his invention to perfection, or to ascertain whether it will answer the purpose intended. His monopoly only continues for the allotted period, in any event; and it is the interest of the public, as well as himself, that the invention should be perfect and properly tested, before a patent is granted for it. . . ." 97 U.S. 137.

These statements of both law and policy as thus announced in 1887 by the Supreme Court have not been changed since that pronouncement and remain the law and policy with respect to such matters today.

In the *Elizabeth v. Pavement Co.* case the patent related to a roadway formed principally of blocks arranged to form spaces of about one inch in thickness between the rows of blocks. (97 U.S. 137). The facts with respect to the asserted public use in that case were that the inventor laid a roadway which was in public view on Mill-dam Avenue in Boston in 1848 which was probably used for a space of six years before his application for a patent (97 U.S. 133). This was a toll road. The section of pavement or roadway was about 75 feet in length. It was stated was placed by him where it was in order to see the effect upon it of heavily loaded wagons on the varied and constant use and also to ascertain its durability and liability to decay.

97 U.S. 133. The inventor, Mr. Nicholson examined the pavement almost daily, walking over it with cane in hand and making particular examination of its condition and made numerous inquiries with respect to its reception by people and at the same time made the statement that this was his first experiment with the pavement. 97 U.S. 133. The severity of the test made of the road came about from the starting and stopping of heavily loaded wagons. It was found the result of the whole being that Nicholson merely intended this piece of pavement as an experiment to test its usefulness, its public acceptance, and durability, 97 U.S. 134.

This Court in *Cataphote Corporation v. De Soto Chemical Coatings Inc.,* 356 F.2d 24, 148 USPQ 527, decided February 8, 1966, did not deviate in its opinion in that case from the principles set forth above as derived from the *Elizabeth v. Pavement Co.* case *supra.* In the Cataphote case the Court stated at page 26, Footnote 2:

> "The trial court was undoubtedly influenced in his conclusion these were not experimental installations, because of the paucity of testimony that anyone on behalf of Cataphote had at any time inspected the results of pavement use."

Before June 10, 1956, i.e., more than one year prior to the filing of the Boyce application the only public exhibition or use that could possibly constitute a public use within the requirements of Section 102(b) of 35 U.S.C. was the demonstrations made in August and September of 1955 to the canners. These demonstrations were of two prototype heads, Exhibits 15 and 16. It was recognized that these devices so demonstrated were not susceptible of commercial operation. In answer to a specific question in this regard Mr. Paul Rea, president of U.S.P. Corporation, which operated the Drew Canning Company

Plant in 1955, testified with respect to the experimental operation conducted in that cannery in 1955, which was conducted under the auspices of FMC personnel:

> "Q. Would you state whether or not it was a machine adaptable for commercial operation at that time?
>
> A. In my opinion, it was not."

R. Vol. 6, page 560.

In this regard the Court found, Finding 19:

> "19. The demonstrations made of Exhibits 15 and 16 to the canners in August and September of 1955 was not such that the machines demonstrated were believed to be capable of acceptable cannery operation."

This fact was recognized by FMC personnel and to all those who witnessed these demonstrations in 1955 and it was made known that the demonstrations were experimental. Thus, the Court adopted Finding 16 which reads:

> "16. The demonstrations made to the canners of Exhibits 15 and 16 in August and September of 1955 were conducted and controlled by FMC in a closed, locked room at California Packing Corporation Plant #3 in San Jose, and it was explained that the project was experimental, was not perfected and that FMC contemplated the necessity of further perfection and that it intended to send a crew of engineers and technicians to Australia to intercept the peach season in Australia in 1956 to carry on further experimentation looking toward perfection of the machines demonstrated, with a hope that it might have machines perfected for operation in the 1956 peach pitting season."

Not only is this finding factually correct, it was conceded during the taking of testimony in this matter that the demonstrations thus made did not consititute a public use:

> "MR. LYON: Your Honor, there is no case cited and no case of record which I have ever been able to find that any court has ever held that a demonstration of a machine or a method made in confidence under experimental conditions, under closed room conditions, ever constituted a prior public use.
>
> THE COURT: I wouldn't think you would find such a case and I don't think that the defendants, in urging their position, have adopted any such theory. Were this case to rest solely upon the demonstrations under the conditions described by Mr. Wilbur, I would say that the preponderance of evidence would be consistent with the idea that the experiments were continuing and the device was in the process of being perfected to the degree expected or desired by FMC. That isn't the commercial exploitation that the defendants rely upon, as I understand their briefs. They rely upon the placing of orders and the delivery of equipment which must have been manufactured in anticipation of use of that equipment during the 1956 packing season. Am I in error in that?
>
> MR. FOSTER: No, that is essentially correct, Your Honor. The demonstration referred to by itself is certainly not proof of public use.
>
> . . ."

R. Vol. 4, pages 368-369.

These were the only demonstrations or use of any kind conducted prior to June 10, 1956.

The purpose of these demonstrations made in 1955 prior to the statutory date of June 10, 1956, do not by any stretch of the imagination fall within the prohibition of section 102(b), 35 U.S.C. In fact, there is not any recited case which prohibits the exhibition in confidence of even a completed fully operative commercial machine which is still in the experimental stage and where it is an established fact, as it is here, that the primary purpose of such demonstration was to determine whether or not, if such machine and process could be brought to the point of commercial applicability, that those invited to see the machine and process would in fact use such method and machine. Every element essential to the Court's finding and the concession made by defendants' counsel that these activities did not constitute a public use, was present. There is no prohibition within the provisions of the Statute against any one making such a demonstration for the purpose as here established of determining whether or not the invention would be used sufficiently by the art to warrant the recognized continued large expenses necessary to see, and to use the words of the Supreme Court in the Elizabeth v. Pavement Co. case, supra:

> ". . . that the invention should be perfect and properly tested, before a patent is granted for it . . . ." (Page 137).

And as said also in Elizabeth v. Pavement Co.:

> ". . . Nicholson did not sell it, nor allow others to use it or sell it. He did not let it go beyond his control . . . ." (Page 136).

Was it unreasonable and did it fall within the condemnation of Section 102(b), 35 U.S.C., for FMC to determine the extent of possible use of the invention by the canners to whom that demonstration was made

in confidence? The answer to this question is obviously no. As explained by Mr. Wilbur, without such determination and facing the very large expenditure necessary to bring this invention to perfection, if it was found that the invention would be unacceptable to the canners the project would have been dropped.

> "Q. What was the purpose, or purposes, if there was more than one, of taking the canners to see this machine at Cal Pac Plant No. 3?
>
> A. There were two purposes, Mr. Lyon. First of all, this method of pitting produced a new appearance to the pit cavity which was not similar to the appearance in any other peach-pitting method, and therefore the first requirement was to determine whether this appearance would be acceptable to the major canners in California who are our customers.
>
> The second purpose was to find out whether this machine might be used — this method of pitting peaches might be used extensively or only to a limited degree.
>
> Q. And did you get expressions of opinion of different canners with respect to this?
>
> A. Yes. Most of them thought the appearance was acceptable, but there were objections to several elements, the presence of fragments and some of the cut surface appearance of the peach.
>
> Q. Why were you interested in getting these expressions of opinion?
>
> A. Because we don't sell peaches and we have to sell to people who have to face the brokers in the market and would know whether or not this appearance might meet with disapproval.

Q. Was this expression of opinion related in any way to a determination of whether or not you would carry on your experimentation?

A. I think obviously, Mr. Lyon. If they considered that the peaches were unsatisfactory in appearance, we would have stopped the work at that time. We had already spent very considerable sums in this experimental work and were faced with the expenditure of much larger sums to carry it on through the next phases."

R. Vol. 4, pages 371-372.

The record in this case and the Findings of Fact establish conclusively that there was in fact no device in existence before June 10, 1956 (the critical date) which was capable of commercial operation to carry out the method defined in the count of the interference. (Findings of Fact 14, 15, 16, 19, 27, 28, 29, 31, 32, 33, 36, 37, and 39).

Findings of Fact 14, 15, 16, and 19 are fully supported by the evidence and no contrary position is possible in view of defendants' concession, R. V. 4, pages 368-369. These demonstrations were the only uses of any device of any kind had before the critical date in which there was any participation of any kind by any person outside of appellants.

In the case of *Amerio Contact Plate Freezers, Inc. v. Belt-Ice Corporation et al.*, 316 F.2d, 459 (1963) it was held that where there was no complete perfected device in existence before the critical date there was *no* public use. In the *Amerio* case the facts were: The critical date was May 23, 1951 (316 F.2d 461). As early as September and October 1950 a mock-up of a machine embodying the essential features of the Knowles invention, which

was operable to demonstrate the invention, was made (461-462). This mock-up was only a model and was not capable of freezing packaged foods (461). Two machines were constructed for Evergreen Frozen Foods Co. and one such machine was assembled by May 15, except for the installation of the freezer plates. There was no question remaining with respect to the operation of such freezer plates in the machines so constructed for Evergreen (461). The two machines thus constructed for Evergreen were delivered on June 19 and 21, 1951, within the critical date, and operated successfully (462). Prior to the critical date in this *Amerio* case, namely on January 30, 1951, Belt-Ice quoted to Evergreen a fixed price for two fifteen-station Knowles automatic package freezers embodying the invention (462-463).

In the *Amerio* case the invention was completely disclosed to Evergreen before this fixed price quotation. There was no assertion of further testing or experimentation at the time of that quotation (462). Parts of the machine were ordered at the approximate time of the fixed price quotation (462). The quotation was made conditional, i.e., "if they could finance them" (463). The final agreement of purchase meeting the condition of finances was not agreed upon until June of 1953, within the critical period (463).

This Court, in considering the foregoing evidence with reference to the "on sale" provision of Section 102(b), U. S. Title 35, affirmed the District Court, holding that there was no public use or on sale within the provisions of Section 102(b) and further held that there was no contract between the parties prior to the critical date of May 23, 1951, stating:

> "The latter facts are sufficient to distinguish every appellate decision, involving an invention incorpo-

rated in an article for sale, upon which appellant relies in attacking this conclusion of law. Those are all cases where, prior to the crucial date, there was an offer or a contract to sell an article or apparatus embodying the invention, and at least one fully-operative article or apparatus of that kind was completed prior to the critical date." (464).

As heretofore pointed out, the prototypes made by FMC and demonstrated in August and September of 1955 to the canners was not capable of commercial operation. No further use was ever made of those prototypes and FMC, consistent with their advice given to the canners that the operation they observed was experimental, thereafter built further devices for testing and it is shown in this record that those devices, when they arrived in Australia, were also incapable of operation and did not overcome the problems of yield and pit fragmentation. The testing in Australia and the building of the new head in Australia also failed to produce a machine capable of commercial operation and although heads of this character were delivered to the canners in 1956, after the critical date, they also proved incapable of satisfactory commercial operation in the canneries. This record conclusively establishes the continued experimentation throughout the 1956 canning season and establishes the conditions under which such experimentation was carried out through FMC personnel in these canneries.

The record establishes that in the 1956 season there were ten distinctly different types or constructions of head under testing which were color coded so as to enable a determination to be made distinctly of the operations of these different types of machines. Plaintiffs' Exhibit 61. The record further establishes the fact that these canneries in which these testing operations were being per-

formed, converted back and forth during these testing operations from the knife pitter to the 300 head and from the 300 head back to the knife pitter so that it was not possible at any time during this trial for any witness to state what particular pitter was being operated in any of the canneries at any particular time. That the experiments of FMC continued through the 1956 canning season was stated by the Court and conceded by defendants' counsel:

> "THE COURT: I don't think there is going to be any argument made by the defendants that work on these heads did not continue right through the 1956 peach canning season. The fact that all the witnesses have described mechanical difficulties encountered during the 1956 season will require that to be a finding of fact in this case. And certainly the volume of engineers and machinists who were placed in both the Fruitvale Canning Company and in the Stockton plant and in the other plants would necessarily indicate that difficulties were encountered by FMC, and during that season they were trying to produce a more satisfactory or sophisticated machine. But if those things are not really in question, I don't know as we need too much testimony to establish them.

You don't question any of that, do you, Mr. Foster?

> MR. FOSTER: No, that's conceded, Your Honor."

The sole Finding of Fact before this Court which would support the Conclusion of Law that the invention was placed in public use prior to the critical date is Finding of Fact 40 which reads:

> "40. The large number of Model 300 machines and the number of lessees involved in FMC's leasing program for the 1956 peach season as well as the circum-

> stances under which such machines were placed for use requires a finding that Plaintiff intended to and did commercially use such machines."

This Finding of Fact is clearly indefinite as to what it actually finds. It is apparently related to the use had of the large number of Model 300 machines which were placed in the canneries during the 1956 peach pitting season. This peach season did not start until July of 1956 and no Model 300 machine was delivered to any cannery until July 1956. Findings of Fact 36 and 37. The machines placed in operation after July of 1956 were like Exhibit 86, i.e., the last of the machines or pitters tested in Australia during 1956.

Finding of Fact 37 finds that the progress and development of the pitter embodying the invention and for carrying out the method was such that

> ". . . it was apparent that those machines did not overcome to a satisfactory degree the problems of yield and pit fragmentation."

All these operations, as referred to in Findings 36 and 37, were within the critical period so that other than as bearing upon the overall picture of continued experimentation and development to bring the invention to the degree or perfection referred to the *Elizabeth v. Pavement* case of the Supreme Court, these findings may be considered as entirely immaterial because they refer to operations carried out within the statutory period and after the critical date. If it is this 1956 peach pitting season operation to which Finding of Fact 40 relates it obviously cannot support the Conclusion of Law that the invention was placed in public use prior to the critical date within the meaning of Section 102(b).

What was the intent of plaintiffs in these transactions? The intent is conclusively shown and it can hardly be

argued to the contrary within the findings adopted and the concession made, that FMC, plaintiff herein, had at all times advised every one of the fact and necessity of, and that they were actually at all times endeavoring, by continued experimentation, testing and development, to bring the peach pitter in question to a degree of commercial success where it was actually susceptible of commercial use. This intent the record clearly shows was related to the fact of the tremendous expenditures being made by FMC to bring this method to a point where it might be commercially used. Finding of Fact 39 affirms this experimentation and testing of the pitting devices up to the end of the 1956 pitting season. The fact that there was expended in this program the sum of $808,907.66 as found by Finding of Fact 39 and also the request for appropriation made in the FMC organization, Exhibits 67 and 102, clearly confirm plaintiff FMC's intent in this regard. Exhibit 67 is a request for additional appropriation to develop the project and is dated as recommended by witness Paul C. Wilbur on July 15, 1956, and significantly states:

> ". . . Some major design modifications, as well as numerous minor design modifications need to be tried experimentally."

It establishes also the history of this development and outlines in some detail the further modification, experimentation, and study program required even as of that late date. Significant in this regard is also Exhibit 68 which is a request for additional appropriation with respect to this project dated by the date of recommendation by plaintiff John Boyce of 12/13/55 and which appropriation was directly related to the construction of eleven heads which were sent to Australia for use in the Australian 1956 season and which establishes:

> ". . . Certain modifications are necessary on these heads for successful commercial operation and improving the pitting appearance; . . ."

The appropriation made by FMC for closing this project is shown at R. Vol. 5, 446.

All of this expenditure by FMC was, as shown by the testimony of Mr. Wilbur, charged to research and development expense. R. Vol. 5, 449-450.

The only activity which took place prior to the critical date of June 10, 1956 to which Finding of Fact 40 has any reference is the leases entered into by FMC, as the large number of Model 300 machines referred to in this Finding did not come into existence until within the statutory period. It may therefore be, although the Finding of Fact 40 does not so state, nor does any Finding of Fact or Conclusion of Law establish it, that the basis of the District Court's ruling is within the "on sale" provision of Section 102(b). A finding which is so indefinite as Finding 40 certainly is not binding in any way upon this Court. Frankly, appellants here are at a loss to understand the meaning of Finding 40 or upon what it is based with respect to the Conclusions of Law drawn therefrom or with respect to the other findings adopted by the District Court.

It is significant in this regard that one instance of prior public use is sufficient to defeat a patent within the provisions of Section 102(b). The number of such instances is therefore immaterial.

Examination of the record with respect to the leases conclusively establishes the following facts:

1. That the leases were of standard form;

2. The leases were primarily for rotary peach pitters;

3. They were uniformly for delivery of peach pitters for use by the canners, i.e., lessees, during the 1956 peach pitting season and the term of the leases was from July 1, 1956 to November 30 of the same year;

4. They called for delivery of the pitters on or about July 1, 1956. Defendants' Exhibit AB-12;

5. The leases were conditional with respect to any specific type of peach pitter;

6. The leases were conditional as established through the testimony of each of the lessees that they were entered into with the understanding that the No. 300 peach pitters called for were experimental and the delivery of that type of head was entirely dependent upon the progress of development thereof during the Australian peach pitting season and the successful development of that machine prior to the 1956 pitting season for commercial operation; and

7. The leases were entered into as is uniformly true of the testimony of the witnesses, upon their understanding of the fact that the knife pitter was interchangeable with the 300 pitter and with the firm understanding of all parties that if the 300 pitter was not successfully developed the knife pitter would be employed.

It is thus established that if this leasing activity or this offering for lease of the pitters was relied upon by the District Court in support of its Finding of Fact 40 it is on all four's with the "if they could finance them" provision of the offering for sale of the freezers at a stated fixed price in the *Amerio* case. The *if* in this case, as established through the testimony of the lessees, was the condition that the machines be brought forward during the further research and development period to

a point where they could be commercially operated, which condition this record establishes was not met by the Australian venture. Section 1441 of the Civil Code of California establishes that viewed as a contract, that contract was void. Section 1441 of the California Civil Code provides:

> "IMPOSSIBLE OR UNLAWFUL CONDITIONS VOID. A condition in a contract, the fulfillment of which is impossible or unlawful, within the meaning of the Article on the Object of Contracts, or which is repugnant to the nature of the interest created by the contract, is void."

This provision has been construed by the Supreme Court of California in *Autry v. Republic Productions, Inc.*, 30 Cal.2d 144 at 148 (1947), where in dealing with the doctrine of frustration which is particularly applicable here and applicable under the Code Section above referred to, the Supreme Court stated:

> "This Court has recently considered the history and nature of the doctrine of frustration as an excuse for nonperformance. (Lloyd v. Murphy, 25 Cal.2d 48 [153 P.2d 47].) There it was pointed out (at p. 53) that although the doctrines of frustration and impossibility are akin, frustration is not a form of impossibility of performance. It more properly relates to the consideration for performance. Under it performance remains possible, but is excused whenever a fortuitous event supervenes to cause a failure of the consideration or a practically total destruction of the expected value of the performance. . . ."

In this case the event which intervened and upon which the contracts or leases were dependent was the perfection of the No. 300 head so that it was applicable for cannery operations during the 1956 canning season. The record

here conclusively establishes that this condition of the understanding of the parties to the contract was not met prior to the critical date of June 10, 1956. The lessees were advised prior to the 1956 canning season that the conditions had not been met.

It is established through the testimony of Mr. Saxby of California Packing Corporation that he was advised by Mr. Wilbur that the development had not been proceeded to the point of producing a satisfactory machine and that the machines were not going to be available and the result was that California Packing Corporation exercised its election and option to use the knife pitters throughout the 1956 pitting season. Mr. Saxby testified:

> "Q. Isn't it true that the determination was made and (sic) not to use the 300 heads before the season started by California Packing Corporation?
>
> A. These — I think I can recall the conversation this way: The season was getting along — approaching, rather, not getting along. When I speak of the season, we run asparagus in that plant, I was thinking as the asparagus got over we would get ready for peaches and the time was getting pretty short, and sooner or later Mr. Wilbur said, 'Well, we aren't going to have these machines available for you to put in up here,' to which I was greatly relieved. And as I said a minute ago I think Mr. Wilbur was extremely relieved. As a matter of fact, afterwards, I don't know if it's of any importance or not, but afterwards he told me that he was darned glad that he didn't put these machines in our Plant 12, and I said I was very glad we didn't either. As a matter of fact, I wrote a letter to our people saying that I thought that we ought to do something else."

R. Vol. 6, pages 578-579.

And as established through Mr. Saxby's testimony California Packing Corporation used the knife pitter in the 1956 season. (581).

Libby, McNeill & Libby, one of the lessees, operated in the same manner as California Packing Corporation, as established by the testimony of Mr. Sigler, except for the use of three experimental type heads which were operated in Libby's plant under the auspices of FMC personnel. In the case of Libby the offer made by FMC was in the form of Exhibit AB-13. Mr. Sigler stated in this respect:

> "A. The offer was made by FMC. When you say 'who,' I don't know who specifically, if that's what you are asking me.
>
> Q. Do you have any acquaintance with Mr. Frank Fay?
>
> A. Yes.
>
> Q. Was he at all involved, to your knowledge?
>
> A. Yes, it would have been Frank Fay at that time.
>
> Q. I take it from your previous testimony that Libby did not accept that offer.
>
> A. Not for the 300 heads, no, we did not.
>
> THE COURT: Why not?
>
> THE WITNESS: As of that time the contract actually was negotiated or set up in late 1955, October-November of 1955, and we couldn't be certain that the performance of it would give us the performance or work on the fruit that we wanted. It was developmental from our viewpoint. We were

just — didn't want to take the chance with them, putting them in.

THE COURT: You mean you wouldn't gamble on your pack?

THE WITNESS: That's it, in essence, yes."

R. Vol. 4, pages 403-404.

Mr. T. H. Richards in his deposition, Exhibit 98, Defendants' Exhibit AB-12, testified with respect to this venture:

> "Those machines were in here, and we tried them out and they didn't work, so we replaced them and used the old type machine. There was no charge or no records of that." Exhibit 98, page 41.

Any payments made by the Bercut-Richards Company for the pitters in 1956 were for the knife pitter. Exhibit 98, pages 47-48.

The 300 heads as this record shows were not possible of performance at the start of the 1956 cannery season because no head was in existence capable of cannery use.

In the case of *Johnson v. Atkins,* 53 Cal.2d 430 (1942), the Court stated the doctrine of frustration is well stated in *Straus v. Kazemekas,* 100 Conn. 581:

> ". . . The doctrine of frustration is well stated in Straus v. Kazemekas, 100 Conn. 581 [124 Atl. 234, 238] where the court says: 'Where from the nature of the contract and the surrounding circumstances the parties from the beginning must have known that it could not be fulfilled unless when the time for fulfillment arrived, some particular thing or condition of things continued to exist so that they must be deemed, when entering into the contract, to have contemplated such continuing existence as the

foundation of what was to be done; in the absence of any express or implied warranty that such thing or condition of things shall exist the contract is to be construed as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible or the purpose of the contract frustrated from such thing or condition ceasing to exist without default of either of the parties. 12 A.L.R. 1275.' " (Pages 431-432).

There is clearly no warranty here with respect to the leases or orders entered into with respect to the 300 heads. They were all conditioned upon the success of the further testing and experimentation to be undertaken in Australia. All of the parties knew of the ability to substitute the knife head in the event the conditions were not met. It is apparent that the parties, at least some of them, were advised that the conditions were not met before the 1956 season and those who were not so advised immediately became cognizant of the fact at the start of the 1956 pitting season. Under these conditions it is apparent that the contracts were void and unenforceable within the principles stated in *Johnson v. Atkins,* 53 Cal. 2d 430 (1942), where at page 433 it is stated:

" ' Throughout the line of cases, now a long one in which it has been held that certain events frustrate the commercial adventure contemplated by the parties when they made the contract, there runs an almost continuous series of expressions to the effect that such a frustration brings the contract to an end forthwith, without more and automatically. They are too numerous to be cited exhaustively, but there are few expressions to the contrary and none in recent cases.' "

What is meant in the law with respect to impossible of performance is well settled in this State in the case of

Oosten v. Hay Haulers Etc. Union, 45 Cal.2d 784 (Dec. 23, 1955), which states:

> "[1] Impossibility of performance is a defense and the burden of proof in establishing it rests on dedendant. (Hensler v. City of Los Angeles, 124 Cal. App.2d 71, 83 [268 P.2d 12]; Paramount Pictures, Inc. v. Sparling, 93 Cal.App.2d 768 [209 P.2d 968]; McCulloch v. Liguori, 88 Cal.App.2d 366 [199 P.2d 25]; Lloyd v. Murphy, 25 Cal.2d 48 [153 P.2d 47].) [2] " ' "Impossibility" is defined in section 454 of the Restatement of Contracts, as not only strict impossibility but as impracticability because of extreme and unreasonable difficulty, expense, injury, or loss involved. [3] Temporary impossibility of the character which, if it should become permanent, would discharge a promisor's entire contractual duty, operates as a permanent discharge if performance after the impossibility ceases would impose a substantially greater burden upon the promisor; otherwise the duty is suspended while the impossibility exists. (Restatement of Contracts, § 462.)' . . ."

Thus, the very doctrine relied upon by this Court in the *Amerio* case within the "if" provision of the offer, leases or contracts, the holding of public use if based upon these offers, orders, or conditional leases, obviously fails. Even if viewed prior to the statutory period the contracts were within the above holdings either entirely void or unenforceable throughout that period of time and in fact throughout the period of the entire existence of said offers or leases because the fact remains as within the *Amerio* case, that there was no fully operative machine capable of carrying out the Boyce invention in existence prior to the critical date.

The Court in Finding 40 stated the large number of Model 300 machines and this must refer either to the

number of machines defined in the offers or the leases or orders, or the number of machines which were experimented with during the 1956 pitting season. One guess is as good as another as to what Finding 40 refers to. The "why" of the number of such machines is fully set forth in this record and there is no contrary evidence.

It is fundamental in cases involving the question of experimentation vs. public use that the facts surrounding each case are controlling and that the character of the experimentation or testing is dependent upon the particular facts of the case as viewed from the evidence submitted. If it requires six years to test a roadway to determine whether it meets the conditions for which it was designed and the tests were actually experimental in character the *Elizabeth v. Pavement Co.* case establishes that that is justifiable experimentation and not public use. There is no case to the contrary of this general rule.

In this case we are dealing with the peculiarities of the canning industry with respect to the development of an invention which must meet the peculiarities of this particular industry. Wilbur, Vol. 3, page 317.

The practice in this industry has been and still is to determine whether or not the development is susceptible of use under commercial environments. Wilbur, Vol. 3, page 318. The real test which the development must meet is that it will operate when used by regular operating personnel and not expert engineers or under the supervision of the inventor. Wilbur, Vol. 3, page 318.

Because of the variations in fruit, operating conditions, and even the variations found in the operation of the same machines in different plants of the same company, multiple installations are required. Vol. 3, pages 320-325. In this regard the testimony of Mr. Wilbur

given in Volume 3, pages 320-321 establishes the conditions which must be met in this are in bringing an invention to perfection for commercial use. Thus, Mr. Wilbur testified:

> "A. I believe I said put out into canneries and operated to see whether they would perform under the control of the cannery operator. But that is not in itself sufficient in all cases, because of the many districts in which fruit is grown and the characteristics of fruit in these districts are such that operation of a group of machines in a single cannery is frequently not sufficient to prove that trouble will not be experienced, and that therefore the machine has been perfected, if it is operated in other canneries and on fruit grown in other districts.
>
> For example, in cling peaches there are something over forty varieties of cling peaches, each of which have their different characteristics. There are I don't know how many agricultural production areas, but they extend all the way from the San Joaquin Basin up to the northern part of California in the coastal regions, and the properties of these peaches are quite different.
>
> Therefore, the requirement exists, in order to prove perfection and prove completion of a development, to operate multiple installations of multiple machines. Even single machines in separate installations are not sufficient. And this is imperative in a development involving the risk capital that is involved in one like coming out with a new peach-pitter."

It remains, however, that these machines which were operated experimentally in bringing this invention to perfection during the 1956 pitting season no matter how

many, cannot act to prove public use because all of this activity took place within the statutory period and after the critical date.

Finding of Fact 38 if it means that any canner paid for the use in the 1956 season for the Model 300 machines is clearly contrary to the record. If it means the sum of FMC customers billed for the lease rentals on pitters and who paid rentals to FMC under the leases it is not contrary to the record. The facts of this case clearly establish that no lessee or operator of the 300 pitter paid for any use of those devices during the 1956 pitting season. Finding of Fact 38 does not find what lease rentals were paid or upon what type of pitter the lease rentals were paid. Further, all activities with respect to these lease payments occurred within the statutory period and could not be considered to have been a public use. The evidence, however, in this regard is clearly insufficient within *Tucker Aluminum Products, Inc. v. Grossman,* 9 Cir., 312 F. 2d, 293 as establishing a public use and certainly cannot be considered to meet the burden of proof required to establish public use. A review of the canners who operated during the 1956 pitting season establishes, through the positive testimony of each of these witnesses, that no payment was in fact made by any canner for the 1956 pitting season operation of the 300 pitter head. In the Bercut-Richards Packing Company operation Mr. T. H. Richards, Jr. testified:

> "MR. T. H. RICHARDS, JR.: Those machines were in here, and we tried them out and they didn't work, so we replaced them and used the old type machine. There was no charge or no records of that." Exhibit 98, page 41.

It is a fact that Bercut-Richards Packing Company in the 1956 season used the knife pitters and that no payment was made for any operation by that Company other than for the use of the knife pitters. With respect to the 300 pitters Mr. Richards, Jr., testified that the few peaches that went through the experimental machines were picked off the line, were bypassed and no records were kept of the peaches processed through such experimental machines, Exhibit 98, pages 41-42. Mr. Richards further testified with respect to the use that was had of these machines as follows:

> "MR. T. H. RICHARDS, JR.: Actually, it cost Food Machinery money and cost us money installing them and taking them out and fooling around with them. That is why there was never any charge for any fruit that was run through. It was purely experimental. It didn't work, so they took them out." Exhibit 98, page 43.

Mr. William D. Poggetto, president of Fruitvale Canning Company likewise testified concerning the intermittent operation of both the 300 head and the knife pitter because of the trouble had with pit fragments. Vol. 3, page 237. He further testified to the continuing experimentation of the 300 type head throughout the entire 1956 peach pitting season and the fact that FMC maintained a crew of mechanics and engineers at the plant constantly during this experimentation. Vol. 3, page 239. Mr. Poggetto testified that a token payment was made with respect to the leasing of the peach pitter which was returned with the result that there was no payment made for the use of either knife pitters or 300 pitters during the 1956 season:

> "THE COURT: So nothing was actually paid under this contract dated December 28, 1955?

THE WITNESS: The net result, no, sir. We did make one payment which was then returned to us.

THE COURT: And you got it back?

THE WITNESS: Yes."

R. Vol. 3, 242.

There is no way of establishing what machine was used with respect to even this token payment. There are no records which would establish what machine was used by the Fruitvale Canning Company at any time during the 1956 season.

"A. We used one or the other or both for our entire operation in the 1956 peach season.

Q. But at any particular time you couldn't tell which machine was in operation?

A. No, sir."

R. Vol. 3, page 239.

Mr. David House, president of Frank M. Wilson Company, testified that no rentals were paid for the use of any FMC peach pitters by this Company in the 1956 season:

"MR. LYON: Q. Now, did the Frank M. Wilson Company use pitters of FMC in the 1956 season?

A. Yes.

Q. Did they pay for those pitters?

A. No. Only in worry."

R. Vol. 3, page 254.

The pitters as used by F. M. Wilson Company were likewise under the personal observation and control of FMC experts and mechanics. Vol. 3, page 257. The extent of

the use at F. M. Wilson Company during this 1956 season is accurately described by Mr. House. R. Vol. 3, page 257. It was at the F. M. Wilson Company plant at the end of the 1956 season that success was finally obtained in the operation of these machines. This was the only plant operating in the 1956 season where the continuous changes resulted in perfection of the Boyce invention. In this regard Mr. House testified:

> "Q. You say later in the year they, by the succession of changes, that the machine began to operate successfully?
>
> A. Very successfully, yes.
>
> Q. And did the Frank M. Wilson Company use those machines during the next year?
>
> A. Yes, we used them from then on out, the following seasons.
>
> Q. And the following seasons did you pay for their use?
>
> A. We paid for it in the '57 season, yes.
>
> Q. But not in the '56 season?
>
> A. Not in the '56.
>
> R. Vol. 3, pages 258-259.

Mr. Alfred A. Morici, Production Manager of Hershel California Fruit Products Company, testified definitely with respect to the failure of the pitters to operate because of pit fragments. R. Vol. 3, pages 280-281. He also testified to the conversion of the pitters to the knife pitter, R. Vol. 3, page 281.

The fact that heads were being changed back and forth by engineering and service crews of FMC is established.

R. Vol. 3, page 286. The number of heads operated in this plant was brought about by the fact as testified by Mr. Morici:

> "THE WITNESS: Oh, yes, yes. They made new heads, brought them up, tried them, went back and made some more new ones."
>
> R. Vol. 3, page 290.

The fact that Hershel paid nothing for the operation of the pitters in the 1956 season is established by Mr. Morici's testimony:

> "Q. Did Hershel pay FMC anything for the operation of these machines in the 1956 season?
>
> A. No. I sent them a bill, which I didn't collect, but I tried to get them to pay me."
>
> R. Vol. 3, page 290.

Mr. Fred H. Hauptman, Plant Manager for Tri-Valley Packing Association, testified that the machines used were the FMC rotary pitters which cut the pit out by a knife. R. Vol. 4, page 335. There is no record that Tri-Valley used the 300 rotary pitter at any time or paid any rental with respect thereto.

Mr. Charles A. Sigler, Assistant in the Production Department of Libby, McNeill & Libby, testified that Libby used only FMC rotary knife pitters in the 1956 season. R. Vol. 4, page 397. Although the 300 pitters were offered to Libby, McNeill & Libby they did not accept the offer, R. Vol. 4, page 404, and Libby paid the rental due for the knife pitter but for no other pitter.

Mr. Joseph James Annotti, President and General Manager of Fairview Packing Company, testified that the only pitter used by Fairview during the 1956 packing

season was the Pacific rotary knife pitter. R. Vol. 4, page 407. No 300 pitter was shown to have ever been at the Fairview Packing Company plant.

Mr. Paul Rea, President of U. S. Products, testified that they tried to use the 300 pitter in the 1956 season and that they converted all of their machines back to the knife pitters. R. Vol. 6, page 564. U. S. Products was relieved of all payments for the use of any pitters, even the knife pitters, as is evidenced from the letter Exhibit 73, R. Vol. 6, pages 566-568, and as stated by the following interrogation:

> "THE COURT: Turned out it didn't work, and it cost you money, and so you didn't pay the rental, and between the two of you, you worked out an arrangement which adjusted your mutual interest?
>
> THE WITNESS: Well said.
>
> THE COURT: That's about it?
>
> THE WITNESS: That's exactly it." R. Vol. 6, page 570.

Mr. Donald Saxby, Manager of the California Division of California Packing Corporation, testified that California Packing Corporation in the 1956 season used only a knife pitter in the commercial pitting of peaches. R. Vol. 6, page 581, and although the 300 pitter was offered to them they elected not to use those machines in their pitting operation. R. Vol. 6, page 578.

The record in this case establishes that some canneries paid rental for the use of the Pacific rotary knife pitters which were under lease to those companies. The record is positive that no rental was actually paid by any company with respect to any use of the 300 pitters. The burden of proof established in Tucker Aluminum Products, Inc. v. Grossman, supra, is certainly not met by this evidence to establish a prior use prior to the pitting season

of 1956; nor is there any support in the record for Finding of Fact 38 unless it is specifically relegated to the use of the Pacific rotary knife pitter.

Finding of Fact 37 clearly establishes the fact that the pitters delivered during the 1956 pitting season were not satisfactory and did not overcome the existing problems which existed throughout this period of experimentation, i.e., the problems of pit yield and pit fragmentation.

The record in this case clearly establishes that no company, no lessee, or no operator could or did testify as to which pitting head, i.e., the knife head or the 300 head was in operation at any time during the 1956 pitting season. All payments which were actually received by FMC with respect to the leases, or orders for pitters during that season, were only with respect to knife pitters and the record is clear and absolute upon this point.

The District Court Erred In Failing To Determine The Question of Priority — 35 U.S.C., § 146.

In the Pretrial Order, paragraph 3, page 2 thereof, Tr. Vol. 1, page 120, it is provided:

> "3. All the proofs of both parties on the issue of public use and/or on sale as contemplated in 35 U.S.C. Section 102(b) will be submitted for the Court's consideration before the submission of proofs on any other issues herein. This order is pursuant to the ruling of the Court to which ruling Plaintiffs except under the authority of *Sanford v. Kepner,* 344 U.S. 13 (1952)."

35 U.S.C. § 146, is a particular Statute with respect to interference proceedings arising in the Patent Office and in which proceedings the Patent Office has determined the question of priority of invention between rival claimants for a patent with respect to that invention.

Significant with respect to this section is the introductory clause thereof which provides:

> "Any party to an interference dissatisfied with the decision of the board of patent interferences on the question of priority, may have remedy by civil action . . . "

In an interference proceeding as conducted in the Patent Office the only question determined is the question of priority and in this proceeding the Patent Office has uniformly taken the position that the question of public use is not before the Patent Office and is not determinable in that proceeding.

In an interference proceeding after the Patent Office has determined the question of priority a patent is issued to the party whom the Patent Office has found, through such proceedings, to be the prior inventor. This is provided by 35 U.S.C., § 135, which provides in part:

> " . . . and the Commissioner may issue a patent to the applicant who is adjudged the prior inventor. . . . "

There is no provision in the Patent Office for withholding the issue of the patent to the person whom the Patent Office has adjudged to be the prior inventor pending the appeal procedures under Section 146. In accordance with this procedure Patent No. 3,075,566 was granted to defendants herein on January 29, 1963.

This patent now stands in this art not only as a scare crow therein but also as a direct deterrent to development in this art. It in effect estopped plaintiffs herein not only from the use of the invention defined therein but also stands as a means of preventing the use of this invention by the art, including those canners which this record shows cooperated so thoroughly with plaintiffs herein in the experimental development of the successful pitter

involving this invention. Thus, unless plaintiffs are wiling to ignore this patent while at the same time asserting that it is an invention and patentable and taking the risk of an adverse decision on the question of patentability, plaintiffs herein are in the position that they and no one else in the art can utilize this invention. This fact is made evident from the frank position taken by defendants herein of their "dog in the manger position". In this regard defendants' counsel has stated:

> "MR. FOSTER: This particular invention is not in use at this time by either party, . . . " R. Vol. 3, page 308.

Further the defendants have taken the position that under no circumstances are they interested in granting a license which would permit the invention to be utilized.

In this respect counsel has stated emphatically:

> ". . . my client is not agreeable to issuing a license to FMC."
>
> R. Vol. 3, page 311.

With this record the District Court, in analyzing the position of the parties before the Court, has stated and it becomes apparent from that statement, that the Court's characterization of this matter as representing defendants' position as "a dog in the manger" is clearly apparent from the following:

> "THE COURT: You correct me when I am in error, let me ask this: In effect, Mr. Lyon's position, Mr. Foster, would be that Filper Corporation, if it has the patent right to the method can adopt what might be broadly described as a dog in the manger attitude in order to keep FMC from utilizing their 300 machine with this type of head?

MR. FOSTER: Yes.

THE COURT: Even through Filper itself wants nothing more than the rather negative protection of eliminating competition of a type which is different than the equipment offered by Filper Corporation?

MR. FOSTER: Yes. This is generally true, Your Honor."

The purpose of the entire Patent Act as defined in our Constitution is to reward inventors who have advanced the arts and where it is shown that patents are being used not to advance the art but to restrain development therein the Court is in a position where it must look at the facts before it with reference to carrying forward the intent of the Constitution rather than to abort it. It is obvious here that within the findings of this Court, if they are interpreted as defendants must interpret them, that is, as established by this record, the Boyce invention was in the possession of FMC long prior to the Anderson application on which Patent No. 3,075,566 was granted, i.e., prior to August 6, 1956. We categorically state that under this situation and as Anderson did not prove any reduction to practice prior to August 6, 1956 before the Patent Office, upon proper determination of the issue of priority the Anderson patent, insofar as it claims the invention common to the parties here in question, would be void, requiring cancellation of the claims from the Anderson patent in question within the provisions of 35 U.S.C. § 135 which provides:

". . . A final judgment adverse to a patentee from which no appeal or other review has been or can be taken or had shall constitute cancellation of the claims involved from the patent, and notice thereof

shall be endorsed on copies of the patent thereafter distributed by the Patent Office."

Defendants' position here, as evidenced in the Pretrial Order and their exhibits listed in conjunction therewith and which contemplated that this Court might under the provisions of the Pretrial Order, paragraph 3 above quoted, determine the question of priority, have listed no evidence which would in any way supplement the Patent Office record or could be relied upon to establish any reduction to practice by Anderson prior to August 6, 1956.

With this record the pertinency of the *Sanford v. Kepner* decision (344 U.S. 13, 97 L.ed 14) of the Supreme Court dealing with the question of the issues before the Court in an action brought under 35 U.S.C. § 146 becomes immediately apparent. The Supreme Court thus in the Sanford v. Kepner case, in reviewing the prior revised Statute, Section 4915, which in this respect was reinacted in 1952 as 35 U.S.C. 146, stated definitely the purpose of this provision of the law:

> "The obvious purpose of the quoted part of RS § 4915 is to give a judicial remedy to an applicant who has been finally denied a patent because of a Patent Office decision against him and in favor of his adversary *on the question of priority.* When the trial court decides this factual issue of priority against him and thus affirms the refusal of the patent by the Patent Office, he has obtained the full remedy the statute gives him. *Only if he wins on priority may he proceed. . . .*" (Emphasis ours). Sanford v. Kepner, 344 US 13, 97 L.ed 15.

The question before the Supreme Court in *Sanford v. Kepner* was with reference to the validity of the patent which was issued to the successful applicant and as to whether or not the Court in such proceedings should or

could in that proceeding determine the question of patentability upon the basis of whether or not there was a patentable invention. There was a diversity of views as pointed out by the Supreme Court as to the obligations and ability of the Court to go ahead in an action brought under Section 146 of U.S. 35 or Section RS 4915 with respect to this determination and it was to settle this difference in views that the Supreme Court granted certiorari. 344 U.S. 14, L.ed 14. The Supreme Court in ruling upon this matter stated:

> " . . . No part of its holding or wording nor of that in Hoover Co. v. Coe, 325 US 79, 89 L.ed 1488, 65 S.Ct. 955, requires us to say RS § 4915 compels a district court to adjudicate patentability at the instance of one whose claim is found to be groundless. Sanford's claim was found to be groundless."

The Supreme Court further stated:

> " . . . Here the very person who claimed an invention now asks to prove that Kepner's similar device was no invention at all because of patents issued long before either party made claim for his discovery. There is no real issue of invention between the parties here and we see no reason to read into the statute a district court's compulsory duty to adjudicate validity." 344 US 16, L.ed 14.

Thus the Supreme Court has definitely read out of the section any duty and we might say any right of the Court to determine the question of patentability of the invention at least until the Court has determined the question of priority between the parties which is the major purpose as determined by the Supreme Court of the section in question. In each of the following cases it is recognized that the issue of priority is the issue before the Court in this type of action. The only diversity of ruling

on this point is as to the propriety or obligation of the Court to determine other issues after it has determined the issue of priority. See: Hill v. Wooster, 132 U.S. 693, 33 L.ed 502; Turchan v. Bailey Meter Company (D. C. Del, 1956), 19 F.R.D. 201; Gold et al v. Gold, 237 F. 84, 87 (C.A. 7, 1916); Hansen v. Slick, 216 F. 164 (D.C. W.D. Pa. 1914), Affirmed C.A. 3, 230 F. 627; Heston v. Kuhlke, 179 F. 2d 222 (C.A. 6, 1950); Sperry Rand Corporation v. Bell Telephone Laboratories, Inc., 171 F. Supp. 343 (D.C.S.D. N.Y. 1959); Sinko Tool & Mfg. Co. v. Automatic Devices Corp., 136 F. 2d 186, 189 (Cir. 2, 1943); and Wiegand v. Dover Mfg. Co., 292 F. 255 (N.D. Ohio 1923).

Thus, in this case the Court in determining the question of public use prior to the determination of the question of priority has proceeded contrary to the directions of the Supreme Court which definitely states:

". . . Only if he wins on priority may he proceed. . ." Sanford v. Kepner, supra. The propriety of this holding of the Supreme Court in construing the section under which this action is brought is clearly emphasized by the facts as hereinabove recited wherein the defendants in this action are shown to be using a probably invalid patent under the peculiar circumstances of this case to deter and stop development in this art and to prevent the use of the very method involved here for the pitting of peaches.

This Court further clearly erred in accepting depositions and permitting the same to be used where it was definitely shown that the requirements of the Federal Rules of Civil Procedure had not been followed. The Court permitted the use of the depositions where the depositions had not been signed by the witness whose deposition was taken and there was no waiver of the

rule with respect thereto. Rule 30 of the Federal Rules of Civil Procedure, section (e) thereof provides:

> "(e) Submission to Witness; Changes; Signing. When the testimony is fully transcribed the deposition shall be submitted to the witness for examination and shall be read to or by him, unless such examination and reading are waived by the witness and by the parties. . . ."

As heretofore shown the depositions in question were not submitted to the witness. Rule 30, section (e) also provides:

> ". . . The deposition shall then be signed by the witness, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. . . ."

The depositions read and used in the evidence in this cause were not signed by the witness and with respect to the witness it was specifically shown that the witness himself declined to make any waiver and requested that he have the privilege of reading and correcting, if necessary, his deposition. There was no refusal of the witness to read the deposition as it was not even submitted to him for that purpose. The Federal Rules of Civil Procedure also require, and the purpose of this rule is obvious, that the parties who intend to rely upon such deposition give notice of filing of the deposition. Thus, Rule 31, section (c) provides:

> "(c) Notice of Filing. When the deposition is filed the party taking it shall promptly give notice thereof to all other parties."

Many depositions are taken on discovery in these cases on which there is no intention of either party to rely at the trial and obviously the purpose of Rule 31, section

(c) in providing for such notice of filing is to give all parties notice that the depositions have been filed and that it may be presumed that they will be used if otherwise qualified. No such notice of filing was given with respect to any of the depositions used in this cause. One of the depositions used was that of Mr. Curtis Paul Wilbur and the ruling of the Court with respect to this deposition is in Volume 2, page 130, and it was at that time pointed out to the Court that Mr. Wilbur had declined personally to waive the rules with respect to his reading and signing his deposition. The deposition was not used to refute or to attempt to impeach any of the testimony given by Mr. Wilbur but as a means of supporting the defendants' case in this cause of action. It is the position of plaintiffs that if the practice with respect to the use of such depositions is to ignore the Federal Rules of Civil Procedure and to permit depositions to be used in Court under the circumstances as hereinabove outlined no party appearing before the Court can know what evidence he must meet but he must assume in a trial of any action that the rules have no meaning and that the Court may proceed in total disregard of the positive requirements of the rules in considering evidence of the character here in question.

CONCLUSION

In this case it is clear that the plaintiffs herein were in possession of the invention long prior to the filing date, namely, August 6, 1956, of the invention by the patentee Anderson. This was conceded and stipulated to. It was conceded and stipulated to and there is no evidence to the contrary, that although the invention was shown to be operable, that is, that the method could be used to get a pit out of a peach, the method as it was reduced to practice developed certain problems, i.e., of pit fragmen-

tation and yield that must be remedied before the invention was capable of commercial application. It was conceded and stipulated that plaintiffs herein worked throughout the period from August of 1955 through the 1956 pitting season to perfect this invention and only then at the end of the 1956 pitting season had they overcome those problems of pit fragmentation and yield necessary to the commercial use of this invention.

It is a fact that plaintiffs herein, before they undertook what subsequently proved to be a mammoth development expense, i.e., eventually $808,907.66 under a condition of confidence and with explanation of the fact that further experimental work was required to bring the method to commercial application, exhibited prototypes involving the invention to canners for the two purposes of determining whether or not the peach halves as produced would be acceptable to the trade in appearance and whether or not the canners would be interested in using the invention and the extent to which they might expect the said method to be used in the event they were successful in perfecting the invention prior to the undertaking of the major portion of the expense subsequently involved in the perfection of this invention. It was conceded that this demonstration under these facts did not constitute a public use. Plaintiffs sought from these canners who were then users of the prior knife pitter a determination of the extent to which they might use the new method were it developed and for this purpose offered to supply the canners with pitters for the subsequent 1956 season and did so in the form of standard leases and/or orders conditional upon the perfection of the invention with the understanding that if the invention was not perfected for use in the 1956 season the knife pitter would be used as a substitute therefor. No actual enforceable contract to supply the new form of pitter for the 1956 season was in any case entered into between

plaintiffs and/or the canners and this is shown not only by the testimony of the witnesses themselves as to their understanding but by the subsequent events.

If facts of this character are prohibited within the provisions of 35 U.S.C. § 102(b), it is evident that one seeking to develop an invention for use in a field like that under consideration must proceed substantially in the dark. He would not be permitted to determine from his possible customers whether or not the invention would be acceptable to those customers. He could not determine the extent to which the invention might be used as a preliminary to the expenditure of hundreds of thousands of dollars in perfecting an invention and any such premise or ruling is obviously contrary not only to the prior rulings of this Court but those of the Supreme Court in the United States which recognize from a standpoint of policy and the law the necessity of and advisability of permitting one to perfect as far as possible his invention before he is required to apply for a patent. No one and in no cited decision that has been found by plaintiffs is there a decision which would deny under the premise of "prior public use" inventors or industry to proceed in the manner here shown.

It is respectfully submitted that the decision of the District Court in this matter must be reversed and that this cause must be returned to the District Court to determine that issue brought before it under this action, i.e., the determination of priority of invention between the parties.

Respectfully submitted,

Lyon & Lyon
Lewis E. Lyon

Attorneys for Appellants and Cross-Appellees

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

By ______________________________

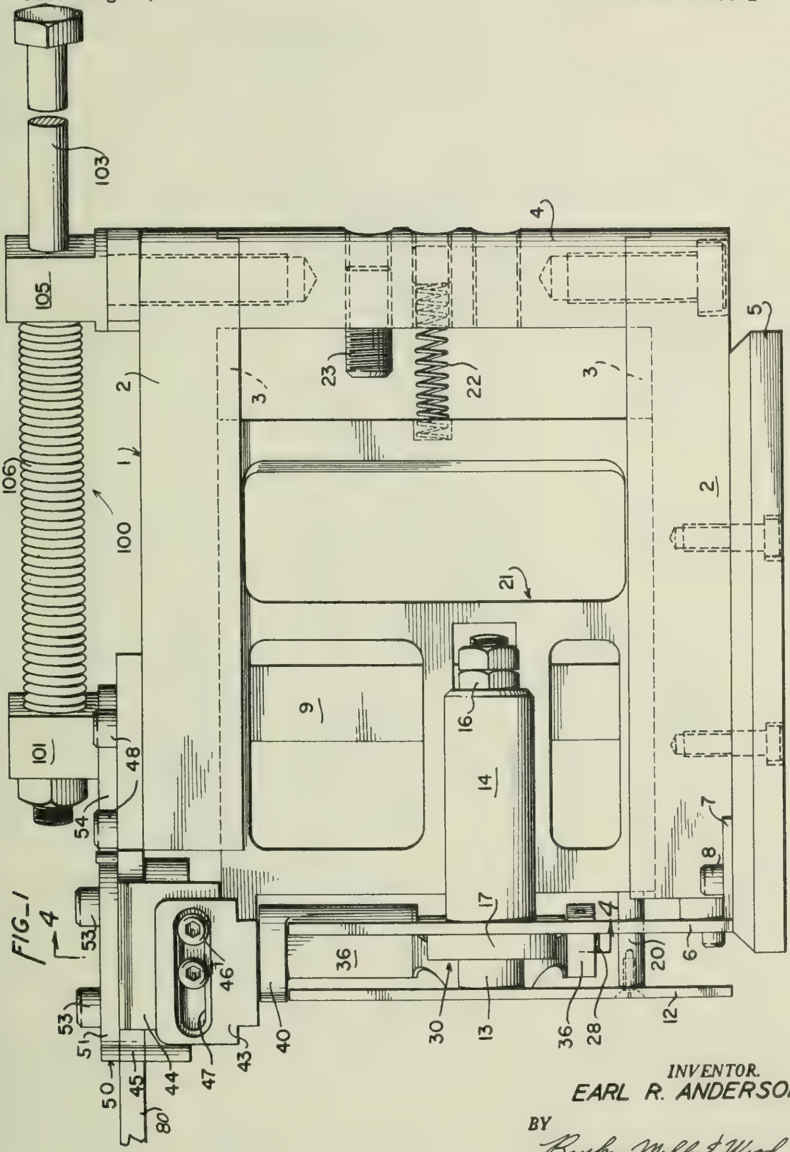
Lewis E. Lyon

APPENDIX A

Jan. 29, 1963 E. R. ANDERSON 3,075,566

PEACH PITTING METHOD

Filed Aug. 6, 1956 5 Sheets-Sheet 1



INVENTOR.
EARL R. ANDERSON

BY
Boyken, Mohler & Wood

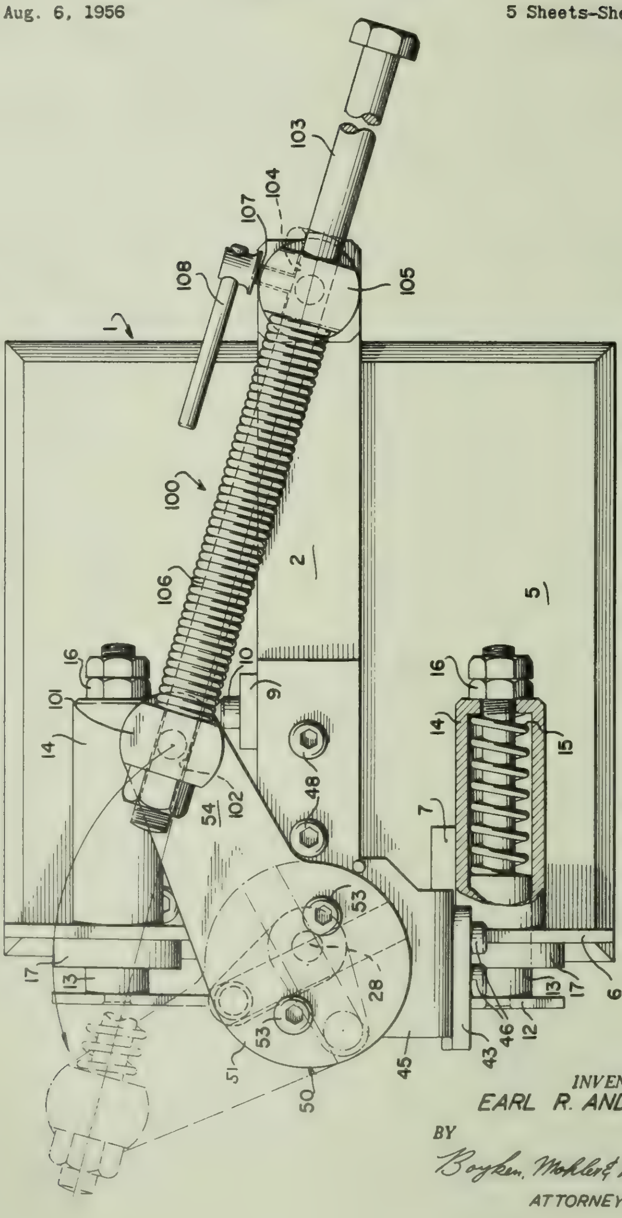
ATTORNEYS

Jan. 29, 1963 E. R. ANDERSON 3,075,566

PEACH PITTING METHOD

Filed Aug. 6, 1956 5 Sheets-Sheet 2

FIG_2



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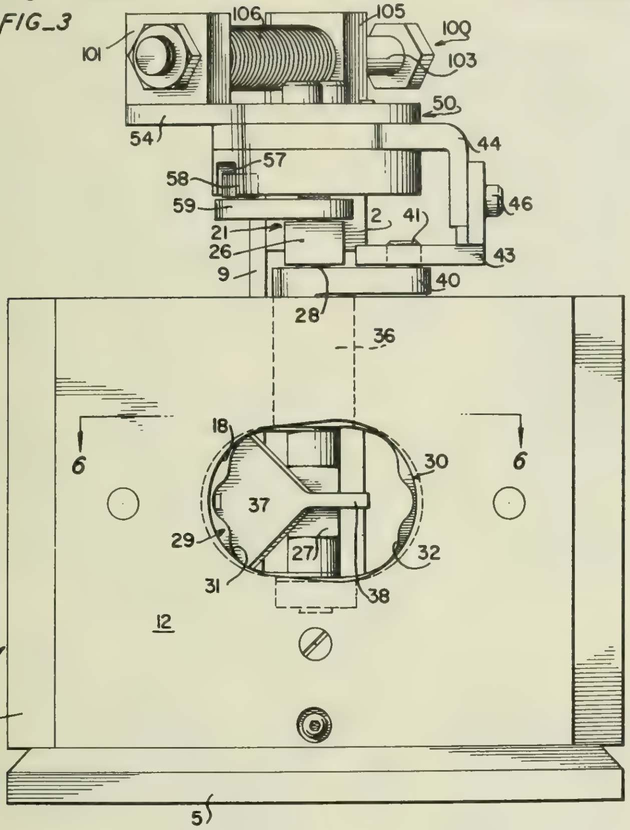
Jan. 29, 1963 E. R. ANDERSON 3,075,566

PEACH PITTING METHOD

Filed Aug. 6, 1956 5 Sheets-Sheet 3

FIG_3



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Jan. 29, 1963 E. R. ANDERSON 3,075,566

PEACH PITTING METHOD

Filed Aug. 6, 1956 5 Sheets-Sheet 4

FIG_4

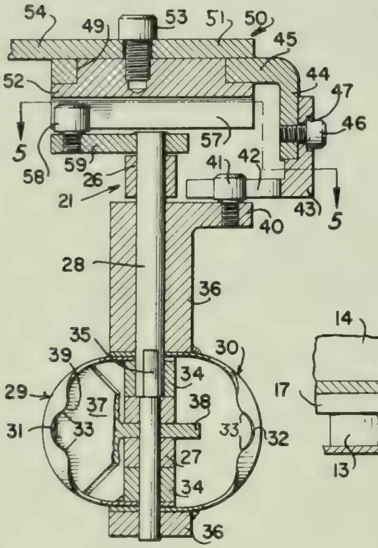


FIG_5

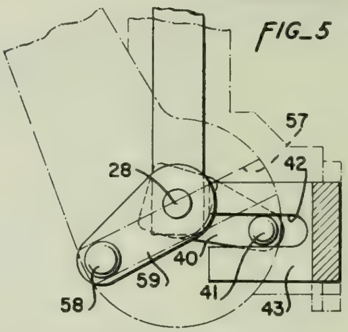


FIG_6

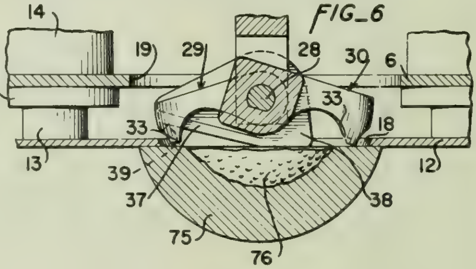


FIG_8

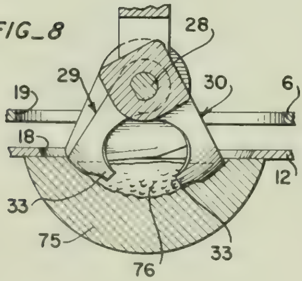
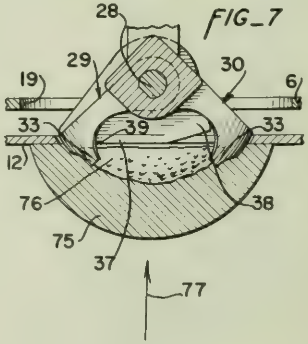


FIG_7



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Jan. 29, 1963 E. R. ANDERSON 3,075,566

PEACH PITTING METHOD

Filed Aug. 6, 1956 5 Sheets-Sheet 5

FIG_9

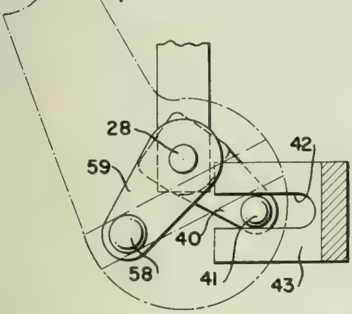


FIG_10

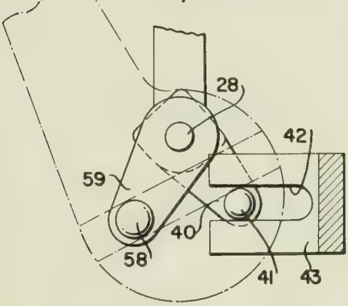


FIG_11

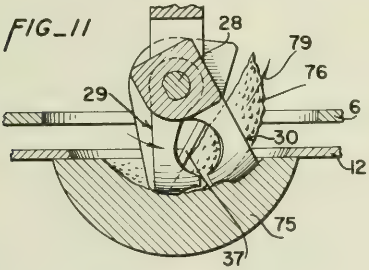
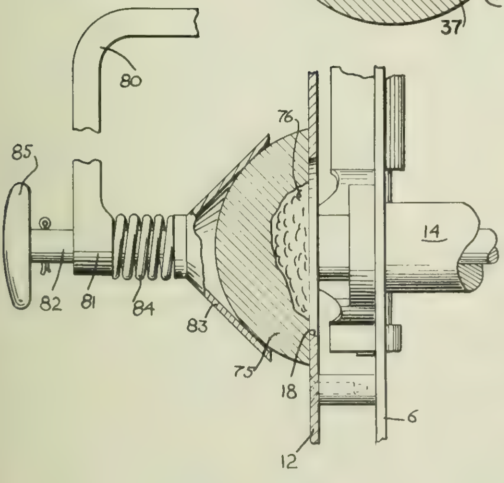


FIG_12



INVENTOR.
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BY
Boyken, Mohler & Wood
ATTORNEYS

United States Patent Office

3,075,566
Patented Jan. 29, 1963

1

3,075,566
PEACH PITTING METHOD

Earl R. Anderson, Campbell, Calif., assignor to Filper Corporation, Richmond, Calif.

Filed Aug. 6, 1956, Ser No. 602,096
7 Claims. (Cl. 146—238)

This invention relates to the pitting of clingstone peaches and, more specifically, to the removal of pits from the peach halves to which the pits may be adhered. The apparatus hereinafter described bears some features that are shown in my copending application, Serial No. 244,795, filed September 1, 1951, now Patent No. 2,775,278.

One of the objects of the invention is the provision of a clingstone peach pitter that will quickly remove the pits from the peach halves with which they are connected by moving each pit bodily out of the pit cavity in the peach half along a path substantially coincidental with the contour of the pit cavity.

Another object of the invention is the provision of a method of removing the half pits from clingstone peach halves by severing the fibers connecting the pit in each half with the flesh of the latter substantially at the adjoining surfaces of the pit and pit cavity by moving the pit along an arcuate path that is substantially in continuation of the curvature of the surface of the pit cavity.

Various prior art devices have been proposed for pitting whole peaches and like fruit of the clingstone variety, a recent development being shown in U.S. Letters Patent No. 2,664,127, issued December 29, 1953 to Joseph Perrelli, in which the pit is held and both peach halves are separated therefrom in one operation without cutting the pit from the fruit. In some cases, however, the fruit as it comes from the orchard may have a defective pit or a pit that is split, and which cannot be held by such apparatus. In such cases removal of a pit from one peach half at a time may be necessary.

Many types of apparatus for cutting a pit from a peach half have been proposed. However, it has been found desirable to separate the pit from clingstone peaches by tearing or rupturing the fibers that adhere the pit to the peach in order to prevent the loss of flesh, and also, it has been found that the flavor of peaches pitted in this manner is superior to those in which the pit and flesh adhering thereto has been completely cut from the peach half.

It is therefore another object of this invention to provide a novel method for pitting peach halves which includes rupturing a portion of the fibers which attach the pit to the peach.

Still another object of this invention is the provision of apparatus for performing the above method.

A further object of this invention is the provision of apparatus for imparting a shock to a pit adhered to a peach half while supporting the pit in a manner to eject the same from the peach half.

Yet another object of this invention is the provision of a method of pitting peach halves by partly cutting and partly rupturing the fibers adhering the pit to the peach half.

Other objects and advantages will become apparent from the description taken in connection with the accompanying drawings, in which:

FIG. 1 is a side elevational view, in full size, of the major portion of the apparatus of this invention;

FIG. 2 is a top plan view of the apparatus of FIG. 1;

FIG. 3 is a front end elevational view of the apparatus of FIG. 1;

FIG. 4 is a sectional view taken substantially along line 4—4 of FIG. 1;

2

FIG. 5 is a sectional view taken substantially along line 5—5 of FIG. 4 and showing the position of the driving mechanism of the apparatus at its original position;

FIG. 6 is a sectional view taken substantially along line 6—6 of FIG. 3 and showing the position of pitting elements as related to the driving mechanism of FIG. 5;

FIG. 7 is a sectional view similar to FIG. 6 showing the position of the pitting elements during the first step of the pitting operation;

FIG. 8 is a sectional view similar to FIG. 6 showing the position of the pitting elements at the end of the first step of the pitting operation.

FIGS. 9 and 10 are sectional views similar to FIG. 5 showing the position of the driving mechanism corresponding to the positions of the pitting elements of FIGS. 7, 8, respectively; and,

FIG. 11 is a sectional view similar to FIG. 6 showing the position of the pitting elements during the final pitting operation; and

FIG. 12 is a partly elevational, partly sectional view of a portion of the apparatus of FIG. 1, showing peach holding means.

In detail, the apparatus of this invention comprises a frame, generally designated **1** (FIGS. 1, 2, 3), composed of a pair of generally horizontal, spaced guide members **2** having opposedly inwardly opening grooves **3** therein. Members **2** are rigidly secured in said spaced relation by a back frame member **4** (FIG. 1) and are rigidly fixed to a horizontal base plate **5**. At the forward end of the base plate **5** the same is provided with an upstanding fixed plate **6** which may be rigidly secured to base **5** as by brackets **7** and screws **8**. Since the upper end of plate **6** is not secured to upper guide member **2**, the forward ends of said guide members may be held in spaced relationship by a side strap **9** (FIGS. 1, 2, 3) secured thereto by screws **10**.

Mounted forwardly of fixed plate **6** and in a spaced, parallel relation thereto is a movable plate **12**. Plate **12** is horizontally reciprocable with respect to plate **6** since it is mounted on a pair of horizontal rods **13** which extend into spring units **14** secured to the rear side of plate **6**. Springs **15** (FIG. 2) in each spring unit **14** urge plate **12** away from plate **6** to the extent limited by stop nuts **16** threadedly received on rods **13**. The inward movement of plate **12** toward plate **6** against the force of springs **15** is limited by spacer collars **17** surrounding rods **13** between plate **12** and plate **6**. Plates **12** and **6** are formed with horizontally aligned openings **18**, **19** respectively (FIGS. 3, 6), for a purpose to be described. Opening **19** may be formed slightly larger than opening **18** and the latter is a little larger than the largest pit expected to be encountered.

Extending rearwardly from movable plate **12** through an opening in plate **6** is a push rod **20** (FIG. 1). The forward end of push rod **20** is secured to plate **12** and its rearwardly directed end is adapted to engage the front end of a slide member **21** which is slidably received in grooves **3** in guide members **2**. Slide member **21** is urged to its forward position (to the left in FIG. 1) by a helical spring **22** interposed between the rear end thereof and back member **4**. The rearward travel of slide member **21** is limited by an adjustable screw **23** projecting forwardly from back member **4**. The forward movement of member **21** is, of course, limited by stop nuts **16** in the same manner as movable plate **12**. It will be noted that the original or forward position of member **21** with respect to plate **12** may be adjusted by interposing push rods **20** of different lengths therebetween.

The forward end of slide member **21** is formed to provide a pair of vertically spaced bearings **26**, **27** (FIGS. 3,

4) in which the vertical drive shaft **28** is journaled. Shaft **28** is free to rotate in bearings **26**, **27** and moves longitudinally of frame **1** with slide member **21**. It will be noted from FIG. 6 that when slide member **21** is in its original or forward position, shaft **28** is positioned in the space between plates **6** and **12**.

In FIG. 4 it will be seen that the lower end of shaft **28** carries a pair of arcuately formed, opposed pit holding elements or blades **29**, **30**. Blades **29**, **30** are substantially U-shaped and their forwardly directed edges are sharpened to provide cutting edges **31**, **32**. Said cutting edges may be formed to the somewhat sinusoidal curve shown with their central portions recessed to provide a pair of nibs **33** on either side thereof. Preferably edges **31** are sharpened substantially throughout their arcuate extent.

The nibs **33** in effect form two portions which are the leading cutting edges of blades **29**, **30**. As will appear later, when blades **29**, **30** cut into the flesh of a peach half adjacent the pit they leave an uncut area at the recess between the nibs **33**.

Blade **29**, which will hereinafter be referred to as the ejector blade, is provided at its inner ends with a pair of opposed bosses **34** having aligned openings for receiving the lower part of shaft **28** therethrough. Bosses **34** are secured as by welding to blade **29** and a flat **35** may be formed on shaft **28** for securing one of said bosses thereto by means of a key or set screw. In this manner, blade **29** is fixed to shaft **28** for rotation therewith.

Likewise the inner ends or legs of blade **30**, hereinafter known as the supporting blade, are provided with a pair of opposed bosses **36** (FIG. 4) which also have aligned openings for receiving shaft **28**. Bosses **36** are secured as by welding to blade **30** and are rotatable with respect to shaft **28**. In effect, as seen in FIG. 4, blade **29** may rotate with shaft **28** inside of the arcuate extent of blade **30**.

Blade **29** is further provided with an integral web **37** (FIGS. 3, 4, 6) extending inwardly from the outer arcuate portion of blade **29** to a central flange **38** positioned between bosses **34** and rotatably received on shaft **28**. The outer portion of web **37** is spaced rearwardly from cutting edge **31** where it is secured to the arcuate portion of blade **29**. Web **37** and the arcuate portion of blade **29** thereby form a pocket **39** (FIGS. 4, 6) for a purpose to be described.

In FIGS. 3, 4, 5 it will be noted that the upper end of upper boss **36** is formed with a crank arm **40** having a follower **41** projecting upwardly therefrom at a point eccentric to shaft **28**. Follower **41** is slidably received in an elongated, horizontal slot **42** formed in a fixed bracket **43**. Bracket **43** is adjustably secured to the downwardly extending leg **44** of a horizontal bearing member **45** as by screws **46** extending through slot **47** in bracket **43** (FIGS. 1, 4). Bearing member **45** is secured to upper guide member **2** by screws **48** (FIGS. 1, 2). It will be noted that the relative angular position of crank arm **40** and therefore of supporting blade **30** may be adjusted by sliding bracket **43** forwardly or rearwardly and securing it in the desired position by screws **46**.

It will be noted in FIG. 4 that the axis of the cylindrical bearing **49** of member **45** is positioned in the central vertical plane of the slide member **21**. A driving head **50** comprising an upper disc **51** and a lower circumferentially grooved disc **52** is journalled for rotation on bearing surface **49** of bearing member **45**. Said discs may be secured together by screws **53** (FIGS. 1, 2) and are provided with a crank arm **54** for rotation head **50** in bearing member **45**. The underside of disc **52** is provided with a horizontally elongated slot **57** (FIGS. 2, 4, 5) which slidably receives a follower **58** carried by a crank arm **59**. Arm **59** is pinned to the upper end of shaft **28** for rotation therewith and follower **58** is eccentric with respect to said shaft. Rotation of driving head **50** by arm **54** thereby rotates shaft **28** through slot **57**, follower **58**, and crank arm **59**. In this manner, ejector blade **29** may be rotated independently of supporting blade **30**.

The drive for head **50** and thereby blade **29** is had through a trigger mechanism, generally designated **100**, shown in FIGS. 1, 2, and 3. Swingably secured to the end of crank arm **54** remote from head **50** is an upstanding boss **101** having a horizontal aperture **102** (FIG. 2) therethrough for receiving one end of an elongated rod **103**. The other end of rod **103** extends through an aperture **104** in a similar boss **105** swingably mounted on the rear end of upper guide member **2**. A helical compression spring **106** surrounds rod **103** and abuts bosses **101**, **105** at opposite ends.

Trigger mechanism **100** may be cocked by pulling rod **103** rearwardly and compressing spring **106** to the position shown in solid lines in FIG. 1. A set screw **107**, provided with a handle **108**, is threadedly received in boss **105** and projects into aperture **104** and may be tightened to secure rod **103** in the cocked position. Upon release by withdrawal of screw **107** spring **106** will forcibly and rapidly snap arm **54** and therefore head **50** to the dot-dash line position of FIG. 2, thereby imparting a rapid rotation to ejector blade **29** through slot **57**, follower **58**, crank arm **59** and shaft **28**. This motion transmitted to blade **29** is in effect a shock or rapid blow, for a purpose to be described.

In operation, the half **75** (FIGS. 6, 7, 9 and 12) of a peach which has been bisected along its sutural plane is presented to the forward face of movable plate **12** with the pit **76** adhering to said peach half arranged generally centrally of opening **18** and being exposed therethrough. In this position, it will be noted that the sutural plane of the peach half and the pit corresponds generally to the plane of movable plate **12**. The peach half **75** is then urged toward plate **12** along the central axis of peach half **75** and pit **76** normal to their sutural plane.

The apparatus shown in FIG. 12 may be provided for the above purpose. A bracket **80** (FIG. 1) extends outwardly and downwardly from member **45** and is provided with a bearing **81** (FIG. 12) at its lower end. Bearing **81** is aligned with the aforementioned peach axis and has a shaft **82** slidably mounted therein for reciprocation along said axis toward and away from plate **12**. Shaft **82** carries a peach supporting cup **83** at its end closest to plate **12** and a helical coil spring **84** may be interposed between said cup and bearing **81** for yieldably urging the cut face of a peach half **75** supported in cup **83** into engagement with movable plate **12**. A knob **85** may be provided on the opposite end of shaft **82** by which cup **83** may be retracted for feeding and ejecting peach halves to and from said cut. The device of FIG. 12 thereby provides means for supporting or holding the peach half during the pitting operation to eliminate the possibility of an operator's hands coming too close to the pitting knives for safety.

At the first or original position shown in FIG. 6 it will be noted that the projecting nibs **33** of the cutting blades **29**, **30** are adjacent the flat surface of the peach half **75** and just outside the ends of pit **76**. The corresponding position of the elements of the mechanism for driving pitting elements **29**, **30** is shown in FIG. 5.

Movable plate **12** is then urged toward fixed plate **6** by pressing on peach half **75** in the direction indicated by arrow **77** in FIG. 7. If desired, this may be done by spring **84** of holder **83**, or manually. This rearward movement of plate **12**, is, of course, limited by collars **17** (FIGS. 2, 6). In moving rearwardly plate **12** drives slide member **21** back against the force of spring **22** (FIG. 1) through push rod **20**. Slide **21** carries drive shaft **28** of the blades with it thereby displacing said shaft with respect to the other elements of the blade driving mechanism. Since followers **41** and **58** are prevented from any substantial rearward movement by slots **42** and **57** respectively, which are held stationary during the above movement, the effect of moving the shaft **28** rearwardly is to rotate crank arms **40** and **59** thereby closing blades **29**, **30** respectively toward each other. Blades **29**, **30** are

closed to the position shown in FIG. 7 around opposite ends of pit **76** and nibs **33** actually cut into the flesh of peach half **75** adjacent said pit. The position of crank arms **40**, **59** corresponding to this position of blades **30**, **29**, is shown in FIG. 9.

In the event the pit **76** is smaller than the largest pit that may be accommodated by the pitting elements **29**, **30**, the same may be further closed against the pit by grasping the rear of slide member **21** and retracting it further, independently of movable plate **12** to the position shown in FIG. 8. The corresponding drive mechanism position is shown in FIG. 10.

The configuration of cutting edges **31**, **32** are such that the blades **29**, **30** do not make a full cut around the pit **76**, but the recess between nibs **33** leaves part of the pit adhered to the peach half. It is desirable that as much of the pit remain adhered to the peach as possible for the following pitting step consistent with relieving the edge of the pit and trimming the pit cavity.

It will be noted that ejector blade **29** has been rotated sufficiently to bring web **37** thereof into contact with the surface of pit **76** opposite peach half **75** (FIG. 7). One end of pit **76** is therefore received in the pocket **39** formed between the cutting edge of blade **29** and said web. Although the drawing discloses a half pit with web **37** in contact with the flat face thereof, it should be noted that the means here described will work as effectively in cases where a whole pit is adhered to a peach half. It may be necessary in such cases to form web **37** to a concave shape so that a configuration of pocket **39** more nearly approaches the shape of the end of the whole pit. However, this is not absolutely necessary as the end of the pit will be received and held in pocket **39** when formed as shown in FIG. 7.

At this point, the trigger mechanism **100** is tripped by withdrawing screw **107** and spring **106** forces arm **54** forward rapidly as described. The blow or rapid rotation thus imparted to pitting element **29** ruptures the remaining fibers that adhere pit **76** to peach half and shocks the pit loose from its cavity (FIG. 11).

It will be noted that supporting element **30** cradles the underside of the pit adjacent the flesh of the peach half during this final pitting step. Not only does blade **30** trim the portion of the pit cavity adjacent the sutural plane of the peach but it also acts to guide the pit through blade **30** and out of the pit cavity in the direction of arrow **79**.

The cavity of a peach half pitted in accordance with the method and apparatus of this invention substantially retains the desirable characteristics of a rough, colored surface and yet is trimmed clean of pit fragments and damaged flesh. The apparatus of this invention, in effect, combines some of the best features of cutting and tearing the pit from a peach half. Although the invention has been described and illustrated in detail, such should not be taken as restrictive thereof since it is obvious that many modifications could be made therein without departing from the spirit and scope of the invention.

I claim:

1. The method of removing a pit from a peach half that comprises the steps of: supporting said peach half against movement and driving the pit therefrom along an arc that is substantially in continuation of the curvature of the convex outer side of said pit and which curvature substantially corresponds with that of the pit cavity in said half and guiding said pit along said arc during said driving thereof.

2. The method of removing a pit from a peach half that comprises the steps of: forcibly moving said pit relative to said half along an arc that is substantially in continuation of the curvature of the pit cavity in said peach half and guiding said pit along said arc.

3. The method of removing a pit from a peach half that comprises the steps of: supporting said peach half against movement and driving the pit therefrom along an arc that is substantially in continuation of the curvature of the convex outer side of said pit and which curvature substantially corresponds with that of the pit cavity in said half, guiding said pit along said arc during said driving thereof and at approximately the same time trimming the flesh from said pit cavity adjacent to the plane of the cut side of said half.

4. A method for pitting peach halves comprising the steps of: supporting the pit of a peach half adhered to the convex surface of said pit adjacent said peach half at one point adjacent the outer periphery of said pit, and forcibly and rapidly imparting a blow to said pit at a point opposed to said one point and generally toward said one point for rupturing the fibers adhering said pit to said peach half and for ejecting said pit from said peach half.

5. A method for pitting peach halves comprising the steps of: partially cutting the flesh of a peach half adjacent the pit adhered thereto at opposed points on said pit adjacent the plane of the suture thereof, supporting said pit at one of said points, and forcibly and rapidly imparting a blow to said pit at the other of said points toward said one point for rupturing the remaining, uncut fibers adhering said pit to said peach half and for ejecting said pit from said peach half.

6. A method for pitting peach halves comprising the steps of: supporting the pit of a peach half adhered to the convex surface of said pit adjacent said peach half at one point adjacent the outer periphery of said pit, forcibly and rapidly imparting a blow to said pit at a point opposed to said one point and generally toward said one point for rupturing the fibers adhering said pit to said peach half and for ejecting said pit from said peach half, and, simultaneously with the step of imparting said blow, trimming the surface of the pit cavity formed by ejection of said pit.

7. The method of removing a pit from its cavity in a peach half which comprises: supporting said peach half, applying an arcuate force to one edge of said pit adjacent one edge of said pit cavity, and guiding said pit adjacent an opposite edge of said pit cavity along an arc which is a continuation of the curvature of said cavity.

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No. 22163

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

John Boyce, an individual, and
FMC Corporation, a corporation,

Appellants and Cross-Appellees,

vs.

Earl R. Anderson, an individual, and
Filper Corporation, a corporation,

Appellees and Cross-Appellants.

REPLY BRIEF OF APPELLANTS AND CROSS-APPELLEES

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases

Rules

Statutes

No. 22163

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REPLY BRIEF OF APPELLANTS AND CROSS-APPELLEES

INTRODUCTION

The brief for Appellees and Cross-Appellants raises essentially two issues on this appeal, the first of which questions is the jurisdiction of the Trial Court to entertain this action, and the second of which relates to the alleged prior public use under Title 35 USC 102. The Opening Brief of Appellants and Cross-Appellees fully answers those issues raised with respect to the alleged public use. Consequently, this brief will be limited to the jurisdictional problem.

THE TRIAL COURT DID NOT LACK JURISDICTION

The original Complaint herein was filed on April 30, 1962 concededly within the period necessary to invoke the jurisdiction of the Trial Court under Title 35 USC 146. A Motion to Dismiss was filed asserting that the Court lacked jurisdiction on the ground that the Complaint failed to contain a specific allegation to the effect that no appeal had been taken to the United States Court of Customs and Patent Appeals.

The Motion to Dismiss was granted with leave to amend, and the First Amended Complaint was filed June 11, 1962 which, in Paragraph V thereof, contained an allegation to the effect that "no previous appeal to the United States Court of Customs and Patent Appeals having been taken". A renewed Motion to Dismiss was filed on the theory that the original defect in the Complaint was jurisdictional and could not be cured by amendment. This renewed Motion to Dismiss was denied.

The Appellants and Cross-Appellees have failed either in the Court below or in this Court to cite any authority to the proposition that this allegation in the Complaint is even necessary. It is perfectly obvious that the filing of the Complaint in the District Court in and of itself constitutes an election under Title 35 USC 146 and that jurisdiction resides in the District Court unless it can be affirmatively established that a prior appeal has been taken to the United States Court of Customs and Patent Appeals.

Assuming, however, for the sake of argument, that such an allegation is necessary, neither *Klumb v. Roach*, 151 F.2d 374 (7 Cir. 1945) nor *Union Carbide Corp. v. Traver Investment, Inc.,* 201 F.Supp. 763 (SD Ill. 1962) sup-

ports the position that the failure to include the above-referred to allegation is jurisdictional. In each of these cases the complaint failed to name an indispensible party and each case was dismissed on this basis. Rule 15 of the Federal Rules of Civil Procedure provides, in part:

> "(a) . . . otherwise, a party may amend his pleading only by leave of the court or by written consent of the adverse party; and leave shall be freely given when justice so requires . . ."

Rule 15(c) of the Federal Rules of Civil Procedure provides, in part:

> "(c) . . . Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. . . ."

Obviously, therefore, the amendment of the pleading in this case relates back to the date of filing of the original Complaint, assuming, again, that such an allegation is necessary in the Complaint.

It was clearly within the knowledge of the Appellees and Cross-Appellants that no appeal had been taken to the Court of Customs and Patent Appeals. There is no conceivable way they could have been prejudiced at all by the procedure adopted by the Trial Court. Therefore, this ground for appeal must fail, first, because there is no authority for the proposition that such an allegation is necessary in the Complaint; second, there is no authority for the proposition that such an allegation is jurisdictional and third, there is no authority for the proposition that the lack of such an allegation cannot be cured by amending the original Complaint under Rule 15 of the Federal Rules of Civil Procedure.

A Complaint should plead only the "ultimate facts" as distinguished from evidentiary facts. The practice of pleading in patent cases was changed to eliminate and dispense with prolix and redundant averments thus eliminating the necessity of pleading affirmatively those statutory requirements to negative the requirements of Rev. Stats. § 4886 and 4887, *Mumm v. Decker & Sons,* 301 U.S. 168, 81 L.ed 982 (1937); *Graff v. Nieberg,* 233 F.2d 860 (1956); and *Price Vacuum Stores v. Admiral Corp.,* 223 F.2d 269 (1955).

CONCLUSION

It is therefore respectfully submitted that the Court did have jurisdiction of this cause and that this ground of appeal must fail for the reasons set forth in the Opening Brief of Appellants and Cross-Appellees. It is further submitted that no prior public use or sale within the provisions of Title 35 USC 102 have been established and the decision of the Trial Court must therefore be reversed.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

By: ____________________________

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Nos. 22,163 and 22,163-A

United States Court of Appeals

For the Ninth Circuit

JOHN BOYCE, an individual, and FMC CORPORATION, a corporation,
Appellants and Cross-Appellees,

vs.

EARL R. ANDERSON, an individual, and FILPER CORPORATION, a corporation,
Appellees and Cross-Appellants.

PETITION FOR REHEARING

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Nos. 22,163 and 22,163-A

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Appellees and Cross-Appellants.

PETITION FOR REHEARING

Appellees and Cross-Appellants (Defendants below) respectfully petition the Honorable Court for a rehearing for the purpose of correcting that portion of its decision of December 16, 1968, which reverses and remands the case to the District Court for trial of the "priority" issue, and for review of the "public use" issue.

The primary purpose of 35 U.S.C. §146 is to determine, by civil action, whether the plaintiff is entitled to a patent. Of the many issues within that basic purpose, the two that are relevant here are:

1. Whether Plaintiffs have "priority" of invention under §102(g), and

2. Whether Plaintiffs placed their invention in public use or on sale in violation of §102(b).

Determination of *either* issue adverse to Plaintiffs is determinative of the basic issue, for Plaintiffs are not entitled to a patent unless they *both* have priority *and* have not placed their invention in public use or on sale. The Court not only "may" but must inquire into the issues, other than priority, bearing on whether the Plaintiff is entitled to a patent [*Hill v. Wooster,* 132 U.S. 693, 698 (1889)] and public use is one of such other issues.

The Trial Court below made an order of proof (not an order for a separate trial), deciding to try the second, public use, issue first because it was simpler and considerably less extravagant of judicial resources and the parties' time and expense. In so proceeding, the Trial Court followed approved practice, as in a typical patent infringement suit under 35 U.S.C. §281, where the basic purpose is to determine, by civil action, whether the defendant has infringed a valid claim of the plaintiff's patent. In such actions, there are often two issues:

1. Whether the defendant is infringing, and

2. Whether the plaintiff's patent is valid.

In view of the language of §281 ("A patentee shall have remedy by civil action for *infringement* of his patent."), some courts prefer to try the infringement issue first on the theory that that is the primary purpose of the section. This Court, however, has taken the prevailing view that it is within the trial court's sound discretion to terminate the trial after determination

of the validity (public use) issue. *Cataphote Corp. v. DeSoto Chemical Coatings, Inc.*, 356 F.2d 24, 27 (note 5) (9th Cir., 1966). So here, the question of which issue should be tried first would seem to be peculiarly within the Trial Court's discretion, which was exercised in favor of trying the public use issue in advance of the priority issue.

In *Sanford v. Kepner*, 344 U.S. 13, 73 S. Ct. 75 (1952), the plaintiff-challenger had been denied a patent by the Patent Office and such refusal had been affirmed by the trial and appellate courts. Here, Plaintiffs Boyce and FMC are in the same position, the only difference being that the Patent Office and Trial Court refusals of a patent were not based on the same statutory provision.

To the plaintiff in *Sanford* (Plaintiffs here) who sought to go further and to contest the validity of the patent issued to the defendant, the Supreme Court said: No, "he has obtained the full remedy the statute gives him." 344 U.S. at 15. If this Court is under the impression that the priority issue involves a determination of the "validity" of defendants' patent, then its ruling is directly contrary to *Sanford*, which holds that one who is refused a patent may *not* proceed to challenge the validity of the other contestant's patent, for the reason that:

> "It is unlikely that this equity proceeding would develop a full investigation of validity. There would be no attack on the patent comparable to that of an infringement action. . . . There is no real issue of invention between the parties here and we see no reason to read into the statute

> a district court's compulsory duty to adjudicate validity." 344 U.S. at 15-16.

A paraphrase of *Cleveland Trust Co. v. Berry,* 99 F. 2d 517, 521 (6 Cir., 1938) is also directly applicable:

> "Appellant's principal attack is directed at the validity of the Berry (Anderson) patent. But neither that question nor the alleged inoperative character of the Berry device is involved in this proceeding. Christie v. Seybold, 6 Cir., 55 F. 69. The question is whether Jardine (Boyce) is entitled, according to law, to receive a patent for his invention as specified in his claim, or for any part thereof."

Since there has been no claim by Defendants that their patent is being infringed, there is no "actual controversy" with respect to its validity that would entitle Plaintiffs to raise that question. *Treemond Co. v. Schering Corp.,* 122 F.2d 702, 705 (3 Cir., 1941).

To remand this case to the District Court for a prolonged trial on the priority issue which can only result in:

(a) reaching the present result that Plaintiff is not entitled to a patent (if the Patent Office is upheld that Anderson has priority); or

(b) returning the case here on the same public use issue now before the Court (if Boyce is determined to have priority);

is respectfully submitted to be a pure waste of the courts' and litigants' time and energy and inimical to the efficient administration of justice.

Rehearing and review of the public use issue is thus respectfully requested.

Dated, San Francisco, California,
December 26, 1968.

Respectfully submitted,
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